

APPENDIX

Supreme Court, U. S.

FILED

FEB 23 1978

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1977

---

No. 77-510

UNITED STATES OF AMERICA,

*Petitioner*

—v.—

STATE OF NEW MEXICO

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF NEW MEXICO

---

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 3, 1977  
CERTIORARI GRANTED JANUARY 9, 1978

**In the Supreme Court of the United States**

OCTOBER TERM, 1977

---

**No. 77-510**

UNITED STATES OF AMERICA,

*Petitioner*

—v.—

STATE OF NEW MEXICO

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF NEW MEXICO

---

**TABLE OF CONTENTS**

	Page
Relevant Docket Entries of Supreme Court of the State of New Mexico .....	1
Docket Entries of the Sixth Judicial District, County of Luna, New Mexico .....	2
DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF LUNA, STATE OF NEW MEXICO	
Order (Jan. 24, 1967) .....	11
Motion for leave to intervene (July 31, 1970) .....	13
Order (July 31, 1970) .....	15
Complaint in intervention (July 31, 1970) .....	16
Notice of <i>lis pendens</i> (Sept. 8, 1970) .....	16
Exhibit A (extract) .....	21
Exhibit B .....	22
Order of reference (Dec. 18, 1970) .....	23
Affidavit of service (Mar. 2, 1971) .....	25



ii	TABLE OF CONTENTS—Continued	Page
	Answer of United States to complaint in intervention (Aug. 2, 1971) .....	26
	Notice of hearing (Aug. 4, 1971) .....	37
	Extract of pretrial order (Oct. 25, 1972) .....	38
	Extract of brief for State of New Mexico (Nov. 30, 1972)....	40
	Extract of pretrial memorandum of United States (Nov. 30, 1972) .....	41
	Transcript of hearing before special master on October 9, 1973 .....	48
	United States Exhibit 4 .....	125
	Unnumbered United States exhibit (extracts from Forest Service Manual) .....	127
	Letter dated Sept. 17, 1974, from special master to counsel....	135
	Letter dated Nov. 22, 1974, from Mr. Simms to special master .....	137
	State's first proposed findings of fact and conclusions of law (submitted Nov. 22, 1974) .....	139
	Letter dated Dec. 5, 1974, from special master to Mr. Simms..	148
	Objections of United States to proposed findings of fact and conclusions of law submitted by State of New Mexico on Nov. 22, 1974 (Jan. 13, 1975) .....	150
	State's memorandum brief (Jan. 31, 1975) .....	153
	Letter dated Feb. 24, 1975, from Mr. Simms to special master..	171
	Letter dated Mar. 7, 1975, from Mr. Simms to special master..	172
	Letter dated Mar. 11, 1975, from special master to Mr. Simms .....	174
	State's second proposed findings of fact and conclusions of law (submitted Mar. 14, 1975) .....	176
	Objections of United States to proposed findings of fact and conclusions of law submitted by State of New Mexico on Mar. 14, 1975 (Apr. 2, 1975) .....	186
	Report of special master (May 5, 1975) .....	190
	State's objections to master's report (May 15, 1975) .....	200
	Letter dated Sept. 2, 1975 from Mr. Simms to Mr. Redd .....	201
	Letter dated Feb. 4, 1976 from Mr. Simms to Judge Hodges....	202

	TABLE OF CONTENTS—Continued	iii
		Page
	Objections of United States to proposed order submitted by State Engineer sustaining objections and modifying findings of fact and conclusions of law (submitted to state judge Apr. 15, 1976) .....	204
	Letter dated Apr. 27, 1976 from Mr. Simms to Judge Hodges..	219
	Order sustaining objections and modifying findings of fact and conclusions of law (June 4, 1976) .....	224
	Notice of appeal (July 2, 1976) .....	232
	Notice of taking appeal (July 2, 1976) .....	233
	<b>SUPREME COURT OF THE STATE OF NEW MEXICO</b>	
	Opinion (reported 564 P.2d 615) .....	234
	Judgment (May 23, 1977) .....	242
	<b>SUPREME COURT OF THE UNITED STATES</b>	
	Order extending time to file petition for writ of certiorari entered August 11, 1977 .....	244
	Order of the Supreme Court granting the petition for writ of certiorari entered January 9, 1978 .....	245

RELEVANT DOCKET ENTRIES OF  
SUPREME COURT OF THE  
STATE OF NEW MEXICO

DATE	PROCEEDINGS
1976	
August 26	Skeleton transcript
September 2	Request for oral argument
November 9	Transcript of record (5 volumes)
November 9	Stipulation
December 22	Brief-in-chief
December 22	Certificate of service
1977	
January 10	Answer brief
January 10	Certificate of service (letter)
February 7	Argued and submitted
May 23	Opinion
May 23	Order affirming
June 3	Mandate
June 8	Receipt for mandate
1978	
January 13	Order U.S. Supreme Court granting certiorari

JUDGE'S DOCKET,  
LUNA COUNTY, NEW MEXICO

Case No. 6326

MIMBRES VALLEY IRRIGATION COMPANY,  
a non-profit corporation, PLAINTIFF

vs.

TONY SALOPAK, d/b/a SALOPAK FARMS, &  
HENRY SCHLOUTHER, LEE BAKER & J. W. HURT,  
INTERVENORS

SOUTHERN PACIFIC & GUYTON B. HAYS,  
Comm. of Public Lands of N.M., INTERVENOR, et al.

Nature of Action: Damages (by Diversion of water)

Benjamin M. Sherman, for Plaintiff

I. M. Smalley, E. L. Mechem, Attys White, Gilbert,  
Koch & Kelly, William O. Jordan, Sp. Ass. Atty Gen.,  
et al., Attorneys

DATE	PROCEEDINGS
1966	
Mar. 21	Adv. St. & Co. fees
Mar. 21	Filing Complaint
Mar. 21	Issuing Summons & copies
Mar. 22	Filing & Entering Temporary Restraining Order & Order to Show Cause
Mar. 22	Filing & Entering Bond
Mar. 28	Issuing Subpoenas & copies to Victor Trujillo & Lewis Putnam
Mar. 28	Filing Summons & Sheriff's Return (Tony Salopak)

DATE	PROCEEDINGS
1966	
Mar. 28	Filing Summons & Sheriff's Return (Henry Schlouther) & Aff. of Serv.
Mar. 28	Filing Motion
Mar. 28	Filing & Entering Order Nunc Pro Tunc
Mar. 29	Filing Motion to Dismiss
Mar. 29	Filing Answer of Henry Schlothauer
Apr. 4	Filing & Entering Temp. Injunction (Dated 3/31/66)
Apr. 4	Filing Motion & Notice (to Intervene)
Apr. 4	Filing Complaint in Intervention
Apr. 12	Filing & Entering Order (Baker & Hurt to Intervene)
Apr. 20	Filing Answer of Tony Salopak
May 5	Filing Answer to Complaint in Intervention
May 17	Filing Stipulation
May 17	Filing Motion
May 17	Filing Notice
Jun. 10	Filing Motion to Intervene & certif. of mailing
Jun. 10	Filing & Entering Order (allowing appearance of Public Lands to file pleading)
Jun. 10	Filing Answer of Intervening Comm. of Public Lands
Jul. 22	Filing Motion to Intervene (Southern Pacific Co.)
Jul. 22	Filing Answer of Southern Pacific Co. to Complaint & Crossclaim
Jul. 22	Filing Notice (Hearing)



DATE	PROCEEDINGS
1966	
Jul. 22	Filing Answer of Southern Pac. Co. to Complaint of Interv. of Pltf. Intervenor Baker & Hurt
Jul. 22	Filing Certificate of Service
Aug. 1	Filing Amended Crossclaim (Southern Pacific Co.)
Aug. 2	Filing & Entering Order (allowing Southern Pac. Co. to enter appearance & pleading)
Aug. 3	Issuing Subpoenas & copies to: Oscar Goldsmith & Gilbert Williams
Aug. 9	Filing Subpoenas & Sheriff's Return (Williams)
Aug. 9	Filing Subpoenas & Sheriff's Return (Goldsmith)
Aug. 10	Issuing Subpoenas Duces Tecum (L. T. Putnam)
Aug. 15	Filing Reply to Amended Crossclaim of Intervenor Southern Pacific Co., by Hurt & Baker
Aug. 16	Issuing Subpoena & copy (Thurmond Yates)
Aug. 29	Issuing Subpoena & copy (Bartley McDonald & Bob Jones, SCS Office)
Aug. 29	Filing Subpoena Duces Tecum & Sheriff's Return
Aug. 30	Issuing Subpoena & Copy (W.P. Stevens)
Aug. 30	Filing Subpoena & Sheriff's Return (Yates)
Aug. 30	Filing Subpoena Duces Tecum & Sheriff's Return
Sep. 20	Filing Transcript of Proceedings
Oct. 11	Filing Amended Answer of Intervening Commissioner of Public Lands of the St. of New Mexico
Oct. 25	Filing & Entering Stipulation
Oct. 26	Filing Notice of Taking Deposition on Written Interrogatories
Dec. 5	Filing Written Interrogatories

DATE	PROCEEDINGS
1967	
Jan. 24	Filing & Entering Order (St. Engineer make hydrographic survey)
Feb. 27	Filing & Entering Order (Court reserves jurisdiction on above Order)
1970	
Jul. 31	Filing Motion for Leave to Intervene
Jul. 31	Filing & Entering Order (allowing St. Engineer to Intervene)
Jul. 31	Filing Complaint in Intervention
Jul. 31	Filing Maps
Jul. 31	Filing Mimbres River Hydrographic Survey Report Volume I
Aug. 17	Filing Motion (for setting aside Order of Intervention)
Aug. 17	Filing Notice (hearing Aug. 25, 1970 at 10 AM)
Sep. 3	Filing Certificate of Service (Motion to Intervene, to Attys of Record)
Sep. 3	Filing Notice to Take Deposition (of Jack Upton)
Sep. 8	Filing Notice of Lis Pendens & Exhibits "A" & "B"
Sep. 15	Filing & Entering Order (Motion to set aside Order of Intervention—Denied)
Sep. 15	Filing & Entering Order Substituting Parties
Dec. 4	Filing Motion (for Special Master & Referee)
Dec. 18	Issuing Summons & copies to U.S.A. for Plaintiff in Intervention
Dec. 18	Issuing Summons (for 900 Defendants) for Plaintiff in Intervention

DATE	PROCEEDINGS
1970	
Dec. 18	Filing & Entering Order of Reference (Irvin S. Moise, Sp. Master & Referee)
1971	
Jan. 15	Filing First Motion to Join Additional Parties Defendant
Jan. 15	Filing First Motion to Correct Defendants' Names
Jan. 26	Filing & Entering First Order to Join Additional Parties Defendant
Jan. 26	Filing & Entering First Order to Correct Defendants' Names
Feb. 9	Filing Second Motion to Join Additional Parties Defendant
Feb. 9	Filing & Entering Second Order to Join Additional Parties Defendant (Town of Silver City & Village of Bayard)
Mar. 2	Filing Affidavit of Service (Mr. Victor Ortega, U.S. Atty & Hon. John N. Mitchell, Atty Gen.)
May 25	Filing Answer of Tony Salopak (Sub-File Nos 712 & 713) & Ex. "A"
May 25	Filing Answer of Henry Schlothauer to Complaint in Intervention
Jun. 14	Filing Third Motion to Join Additional Parties Defendant
Jun. 15	Filing & Entering Third Order Joining Additional Parties Defendant
Jun. 15	Filing Second Motion to Correct Defendants' Names
Jun. 15	Filing & Entering Second Order to Correct Defendants' Names

DATE	PROCEEDINGS
1971	
Jul. 20	Filing Third Motion to Correct Defendants' Names
Jul. 20	Filing Fourth Motion to Join Additional Parties Defendant
Jul. 22	Filing Fifth Motion to Join Additional Parties Defendant
Jul. 27	Filing & Entering Third Order Correcting Defendants' Names
Jul. 27	Filing & Entering Fourth Order Joining Additional Parties Defendant
Jul. 27	Filing & Entering Fifth Order Joining Additional Party Defendant
Aug. 2	Filing Answer to Complaint in Intervention by U.S. of America
Aug. 4	Filing Notice of Hearing (9/16/71 9 AM Sp. Master, Irwin S. Moise, apptd.)
Aug. 4	Filing Certificate of mailing
Aug. 10	Filing Fourth Motion to Correct Defendants' Names
Aug. 10	Filing & Entering Fourth Order Correcting Defendants' Names
Sep. 7	Filing Certificate of Mailing (of Answer of U. S. to Comp. in Intervention)
Oct. 29	Filing Sixth Motion to Join Additional Parties Defendant
Oct. 29	Filing Fifth Motion to Correct Defendants' Names
Nov. 2	Filing & Entering Sixth Order Joining Additional Parties Defendant
Nov. 2	Filing & Entering Fifth Order Correcting Defendants' Names



DATE	PROCEEDINGS
1971	
Dec. 1	Filing Seventh Motion to Join Additional Parties Defendant
Dec. 1	Filing Sixth Motion to Correct Defendants' Names
Dec. 7	Filing & Entering Seventh Order Joining Additional Parties Defendant
Dec. 6	Filing & Entering Sixth Order Correcting Defendants' Names
1972	
Feb. 4	Filing Interrogatories by Def. Henry Schlothauer
Feb. 9	Filing Oral Depositions of Ledru Hyatt & Edward W. Nunn, Sr.
Feb. 15	Filing Motion for Protective Order
Oct. 12	Filing Appearance (State Engineer)
Oct. 25	Filing & Entering Pre-Trial Order
Nov. 30	Filing Brief for Plaintiff-In-Intervention (by Richard Simms, Sp. Asst' Atty Gen, St. Engineer, Santa Fe)
Dec. 18	Filing Pre-Trial Memorandum (of the U.S.)
Dec. 29	Filing copy of letter of Richard A. Simms, Spec. Asst. Atty Gen, requesting extention of time to Jan. 5 to file brief
1973	
Jan. 10	Filing Response to Pre-Trial brief for Plaintiff-In-Intervention
Jan. 10	Filing Certificate of mailing
Oct. 8	Filing Praeceptum
Oct. 8	Issuing Subpoenas & copies to Regis McSherry, Adan Baca & Tom Anderson, Dist. Cons.

DATE	PROCEEDINGS
1973	
Oct. 9	Filing Subpoenas & Sheriff's Return (Adan Baca)
Oct. 15	Filing Subpoenas & Sheriff's Return (Regis McSherry)
Oct. 15	Filing Subpoenas & Sheriff's Return (Tom Anderson)
Dec. 17	Filing Fees & Costs of Special Master, copy of charges attached
Dec. 17	Filing & Entering Order (costs to be paid by State Engineer & U.S. of A.)
1974	
Sep. 26	Filing 11 Affidavits of Service (May 22, 1971 thru Aug. 28, 1971)
1975	
Jan. 13	Filing Objections to Proposed Findings of Fact & Etc. of the State of N.M.
Jan. 13	Filing Certificate of Mailing
Apr. 2	Filing Objections to Prop. Findings of Fact, etc., by U.S. & cc of Certif. of mailing
May 5	Filing & Entering Findings of Fact & Conclusions of Law (as to water rights of U.S.)
May 15	Filing Objections to Master's Report
Sep. 3	Filing Letter of Spec. Assistant Atty Gen. to Atty Redd in Washington, D.C. (hearing on Feb. 2, 1976 10 AM)
1976	
May 10	Filing Mimbres River Hydrographic Survey Report Vol II—Sub-Section I

DATE	PROCEEDINGS
1976	
May 10	Filing Key Map of Mimbres River Hydrographic Survey, Township, Tiers 22 & 23 South
May 10	Issuing Summons & copies & returning to St. Engineer's Office, & filing
May 21	Filing Seventh Motion to Correct Defendants' names
May 21	Filing & Entering Seventh Order Correcting Defendants' Names
May 21	Filing Eighth Motion to Join Additional Parties Defendant
May 21	Filing & Entering Eighth Order Joining Additional Parties Defendant
June 4	Filing Objections to Proposed Order Submitted by State Engineer Sustaining Objections, etc.
June 4	Filing & Entering Order Sustaining Objections & Modifying Findings of Fact & Conclusions of Law
June 14	Filing Ninth Motion to Join Additional Parties Defendant
June 14	Filing Exhibits (U.S. & St. of N.M.—Forest Service—Recv'd of Judge Norman Hodges)
June 14	Filing & Entering Ninth Order Joining Additional Parties Defendant
July 2	Filing Notice of Appeal (Filed by Dept. of Agriculture Forest Service, USA)
July 2	Filing Notice of Taking Appeal
July 2	Filing Praecipe (for Complete Record)

IN THE DISTRICT COURT OF THE  
SIXTH JUDICIAL DISTRICT OF THE  
STATE OF NEW MEXICO,  
WITHIN AND FOR THE COUNTY OF LUNA

No. 6326

MIMBRES VALLEY IRRIGATION CO.,  
a non-profit corporation, PLAINTIFF

vs.

TONY SALOPAK, dba Salopak Farms,  
and HENERY SCHLOUTHAUER, DEFENDANTS

LEE BAKER and J. W. HURT, Individually, INTERVENORS

GUYTON B. HAYS, Commissioner of Public Lands of the  
State Of New Mexico, INTERVENOR

SOUTHERN PACIFIC COMPANY, INTERVENOR

[Filed Jan. 24, 1967]

ORDER

This matter coming before the Court for trial without a Jury and having been tried on March 29th & 30th, 1966, and on October 11th through 13th, 1966, and the Court having considered the evidence and being of the opinion that a decision cannot be made in this matter without a hydrographic survey being made as to the surface water rights of the Mimbres River stream system located in the Counties of Grant and Luna within the State of New Mexico.

NOW, THEREFORE BE IT ORDERED that the State Engineer of the State of New Mexico be, and he is hereby directed, pursuant to the provision of Section 74-4-6 N.M.S.A. Comp. (Supp.) to forthwith make and furnish to this Court a Complete hydrographic survey of the sur-

face waters of the Mimbres River within the Counties of Grant and Luna in New Mexico, and that such hydrographic survey be commenced forthwith and completed as soon as same may conveniently be done.

Dated the 24th day of January, 1967.

/s/ Norman Hodges  
District Judge

IN THE DISTRICT COURT OF THE  
SIXTH JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF LUNA

MIMBRES VALLEY IRRIGATION CO.,  
a non-profit corporation, PLAINTIFF

—vs.—

TONY SALOPAK, dba Salopak Farms,  
and HENRY SCHLOUTHER, et al., DEFENDANTS

STATE OF NEW MEXICO, ex rel.  
S. E. Reynolds, State Engineer,  
PETITIONER FOR INTERVENTION

[Filed July 31, 1970]

MOTION FOR LEAVE TO INTERVENE

COMES NOW the State of New Mexico, on the relation of S. E. Reynolds, State Engineer, and respectfully moves this Court to issue its Order allowing the State of New Mexico, on the relation of S. E. Reynolds, State Engineer, to intervene in the above-styled and captioned cause as a Plaintiff-in-Intervention, and as its grounds therefor states:

1. The above-styled and captioned cause seeks a determination of the relative rights of the parties thereto in public waters of the Mimbres River Stream System;
2. This Court has ordered, and the State Engineer has completed and filed in this cause, a hydrographic survey of the Mimbres River Stream System;
3. Section 75-4-6, N.M.S.A. 1953 Comp., requires that in all suits involving the determination of rights to public waters in any stream system, all known and unknown claimants of interest therein should be joined, a hydrographic survey performed, and provides for the intervention by the State of New Mexico to accomplish a comprehensive and orderly adjudication of all such claims.



WHEREFORE, Movant requests leave to intervene on the Complaint-in-Intervention attached hereto and submitted herewith.

Respectfully submitted,

PAUL L. BLOOM  
 PETER THOMAS WHITE  
 Special Assistant Attorneys General  
 State Engineer Office  
 State Capitol  
 Santa Fe, New Mexico 87501  
 ATTORNEYS FOR NEW MEXICO STATE  
 ENGINEER

By /s/ Paul L. Bloom

IN THE DISTRICT COURT OF THE  
 SIXTH JUDICIAL DISTRICT  
 IN AND FOR THE COUNTY OF LUNA

MIMBRES VALLEY IRRIGATION Co.,  
 a non-profit corporation, PLAINTIFF

vs.

TONY SALOPAK, dba Salopak Farms,  
 and HENRY SCHLOUTHER, et al., DEFENDANTS

STATE OF NEW MEXICO, ex rel.  
 S. E. Reynolds, State Engineer,  
 PETITIONER FOR INTERVENTION

[Filed July 31, 1970]

ORDER

THIS MATTER coming on to be heard upon the Motion of the State of New Mexico for leave to intervene and the Court having considered the Motion and being otherwise advised in the premises finds that it should be and it is hereby granted.

/s/ Norman Hodges  
 District Judge

IN THE DISTRICT COURT OF THE  
SIXTH JUDICIAL DISTRICT IN AND FOR THE  
COUNTY OF LUNA, STATE OF NEW MEXICO

No. 6326

MIMBRES VALLEY IRRIGATION CO.,  
a non-profit corporation, PLAINTIFF

v.

TONY SALOPEK, dba Salopek Farms,  
and HENRY SCHLOUTHAUER, DEFENDANTS

LEE BAKER and J. W. HURT, individually, INTERVENORS  
GUYTON B. HAYS, Commissioner of Public Lands of the  
State of New Mexico, INTERVENOR

SOUTHERN PACIFIC COMPANY, INTERVENOR

STATE OF NEW MEXICO, ex rel.  
S. E. Reynolds, State Engineer,  
PLAINTIFF-IN-INTERVENTION

v.

ESTATE OF DAVID ABRAHAM \* \* \* [approximately 244  
defendants-in-intervention omitted] \* \* \* FORT BAYARD  
MILITARY RESERVATION \* \* \* [approximately 658 de-  
fendants-in-intervention omitted] \* \* \* UNITED STATES  
OF AMERICA \* \* \* [approximately 98 defendants-in-  
intervention omitted] \* \* \* ALL UNKNOWN HEIRS OF  
ANY PERSON NAMED ABOVE, AND ALL CLAIMANTS OF  
INTEREST TO WATER IN THE MIMBRES RIVER STREAM  
SYSTEM, DEFENDANTS-IN-INTERVENTION

[Filed July 31, 1970]

COMPLAINT-IN-INTERVENTION

COMES NOW State of New Mexico, on the relation of  
S. E. Reynolds, State Engineer, Plaintiff-Intervenor, by  
and through its attorneys, and states:

I.

S. E. Reynolds is the duly appointed, and qualified, State  
Engineer of the State of New Mexico, charged by law  
with the supervision of the apportionment of public waters  
of the State according to the licenses issued by him and  
his predecessors and the adjudications of the Courts.

II.

This action arises under Sections 75-4-2, 75-4-4, 75-4-6,  
75-4-7, 75-4-8, New Mexico Statutes Annotated, 1953  
Compilation.

III.

The Mimbres River, its surface-water tributaries, and the  
underground waters tributary and related thereto, in-  
cluding all public waters within the Mimbres Under-  
ground Water Basin, constitute a stream system of the  
State of New Mexico.

IV.

The surface and underground waters of the Mimbres  
River Stream System are public waters of the State of  
New Mexico, subject to appropriation for beneficial use  
as provided by law.

V.

S. E. Reynolds, State Engineer, has caused to be under-  
taken a hydrographic survey of the Mimbres River Stream  
System, and a report of a portion of this survey has been  
filed with the Court; a remaining portion of the report  
will be filed with the Court upon completion.

VI.

The Plaintiff-Intervenor is informed and believes, and  
therefore avers, that the Defendants, and each of them  
named in this Complaint, claim rights to take and use



the waters of the Mimbres River Stream System, and base their claims upon the Constitution and laws of the State of New Mexico.

#### VII.

The claims of the Defendants, and each of them, to the waters of the Mimbres River Stream System, as against each other and as against the State of New Mexico, have never been fully determined and decreed by the Courts.

#### VIII.

Unless this Court determine and decree the rights of the Defendants, and each of them, to the waters of the Mimbres River Stream System, as against each other and as against the State of New Mexico, the administration and supervision of the waters of the Mimbres River Stream System required by law will be impossible.

WHEREFORE, Plaintiff-Intervenor respectfully prays:

1. That this honorable Court appoint its master to take evidence and make his report on all questions of fact and law, which report shall determine all general and specific issues of fact properly arising in this action, and to make such findings of fact and conclusions of law as may appear to him necessary and proper;

2. That the Defendants, and each of them, be required to appear before the Court and describe fully and in detail what rights, if any, they claim to the use of the water in the said Mimbres River Stream System, and more specifically to state:

- a. When said water right was initiated;
- b. If a water right for irrigation is claimed, the lands to which it is appurtenant;
- c. Source of water;
- d. Purpose for which it is used;
- e. The amount of water necessary for the beneficial use for which it was appropriated;

f. Such other matters as may be necessary to define a particular right and its priority;

3. That the Court determine and define the water rights of each of the several defendants, as against the State of New Mexico and *inter sense*, and enter its decree stating:

- a. The water rights adjudged each party;
- b. The source, priority, amount, purpose, periods, and place of use of each right;
- c. The specific tracts of land to which the water right for irrigation is appurtenant;
- d. Such other matters as may be necessary to define a particular right and its priority;

4. That the Court enter its Order enjoining all illegal use of surface and underground waters of the Mimbres River Stream System, and where necessary require measuring devices at points of diversion in this stream system;

5. That the Court name additional parties from time to time as it appears necessary for the determination and adjudication of all the water rights of the Mimbres River Stream System;

6. That the Court enter such preliminary, interlocutory, and final orders as are necessary to a final determination and adjudication of all water rights of the Mimbres River Stream System.

PAUL L. BLOOM  
PETER THOMAS WHITE  
Special Assistant Attorneys General  
State Engineer Office, State Capitol  
Santa Fe, New Mexico 87501

ATTORREYS FOR NEW MEXICO STATE  
ENGINEER

By /s/ Paul C. Bloom

[Filed in State District Court Sept. 8, 1970]

# NOTICE OF LIS PENDENS

NOTICE IS HEREBY GIVEN that there is now pending in the District Court of the Sixth Judicial District of New Mexico the above-styled and numbered cause. The parties defendant are listed in Exhibit "A" attached hereto, and made a part hereof. This suit affects or concerns the title to water rights located in Grant and Luna Counties, and the defendants claim a right to the waters of the Mimbres River Stream System, as more particularly described in Exhibit "B", attached hereto and made a part hereof, and further affects or concerns water rights for municipal, domestic, industrial, or manufacturing uses where the point of diversion or use is within the boundaries of the Mimbres River Stream System.

The object of this suit is to adjudicate all the uses of surface and groundwaters of the Mimbres River Stream System and to enjoin all illegal use of said waters.

/s/ Peter Thomas White  
 PETER THOMAS WHITE  
 Special Assistant Attorney General  
 State Engineer Office, State Capitol  
 Santa Fe, New Mexico 87501

ATTORNEY FOR S. E. REYNOLDS,  
 NEW MEXICO STATE ENGINEER

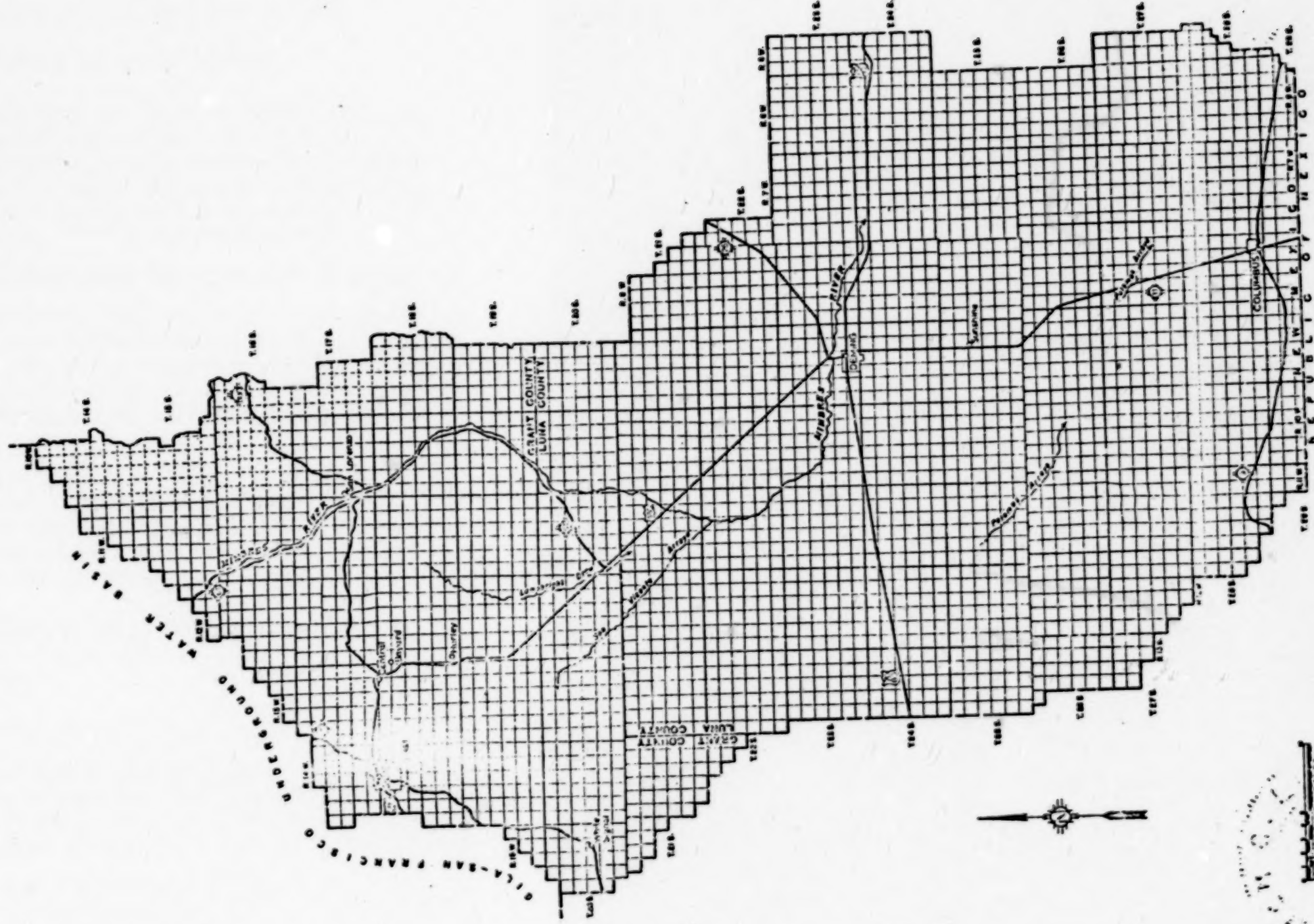
## EXHIBIT A

Name	Sub-File	Page
Fort Bayard Military Reservation	233	254
U.S.A., Dept. of Agriculture, Forest Service	818	412
U.S.A., Federal Aviation Agency	819	414

# MINNESOTA, ILLINOIS UNDERGROUND WATER BASIN

N. MEX. STATE ENGINEER

1970



1970  
Chg. 2 March 4, 1960

EXHIBIT "B"



[Filed in State District Court Dec. 18, 1970]

### ORDER OF REFERENCE

THIS MATTER came on to be considered upon the motion of the plaintiff, State of New Mexico ex rel. S. E. Reynolds, State Engineer, praying that the Court appoint Irwin S. Moise as the Special Master and Referee in this cause, and the Court having considered said motion and being otherwise fully advised in the premises finds:

1. That this cause involves more than 900 defendants;
2. That the plaintiff-in-intervention has reason to believe from previous experience in the adjudication of water rights that a substantial number of defendants will contest the Offers of Judgment made to them and as to each such defendant a hearing may be required.
3. That the appointment of Irwin S. Moise as the Special Master in this cause will permit considerable economies in the time of this Court and will provide a more speedy and inexpensive determination of particular questions of fact and law.

IT IS THEREFORE ORDERED that Irwin S. Moise should be and he is hereby appointed Special Master and Referee in this cause.

### IT IS FURTHER ORDERED:

2. That the said Special Master shall make inspections, take testimony and hold hearings at whatsoever times and places he may deem appropriate on all contested issues of law or fact in this cause;
2. That he shall make report to the Court at the conclusion of every hearing or investigation in which he presides, and each report shall, where appropriate, contain his Findings of Fact and Conclusions of Law;

3. That he shall be compensated at the rate of \$100.00 per day or \$12.50 per hour, plus reimbursement for his reasonable and necessary expenses, which expenses shall include travel, lodging, and the employment of court reporters and interpreters when required. The Master shall periodically certify his fees and costs to the Court, which costs, upon approval of the Court, shall be assessed against the District Court fund;
4. That any party to a proceeding before the Special Master may appeal from an adverse decision of the Master to the Court by filing within ten days after the filing of the Special Master Report to which he objects a motion for a trial setting in that matter.

DATED this 17th day of December, 1970.

/s/ Norman Hodges  
HON. NORMAN HODGES  
District Judge

[Filed in State District Court Mar. 2, 1971]

### AFFIDAVIT OF SERVICE

I hereby certify that on February 9, 1971 I mailed by certified mail return receipt requested copies of the State of New Mexico ex rel. S. E. Reynolds, State Engineer's, Summons and Complaint-in-Intervention to Mr. Victor Ortega, U.S. Attorney for the District of New Mexico and to the Honorable John N. Mitchell, Attorney General for the United States of America. Evidence of receipt of the said Summons and Complaint-in-Intervention is made with attached copies of receipt for certified mail and signed return receipt card.

/s/ Peter Thomas White  
PETER THOMAS WHITE  
Special Assistant Attorney General  
State Engineer Office, State Capitol  
Santa Fe, New Mexico 87501  
ATTORNEY FOR S. E. REYNOLDS  
NEW MEXICO STATE ENGINEER

Subscribed and sworn to before me this 1st day of March, 1971.

[SEAL]

/s/ [Illegible]  
Notary Public

My Commission Expires: October 1, 1973



[Filed in State District Court Aug. 2, 1971]

## ANSWER TO COMPLAINT IN INTERVENTION

The United States of America by its duly authorized attorneys in answer to the State of New Mexico's Complaint in Intervention alleges as follows:

### I.

Admits the allegations of paragraph I.

### II.

Admits the allegations of paragraph II.

### III.

Admits the allegations of paragraph III.

### IV.

Denies the allegations of paragraph IV with respect to waters in and on lands within the State owned by the United States.

### V.

With respect to the allegations of paragraph V the defendant lacks sufficient knowledge upon which to base an affirmation or denial.

### VI.

With respect to the allegations of paragraph VI the defendant lacks sufficient knowledge upon which to base an affirmation or denial.

### VII.

Admits the allegations of paragraph VII.

## VIII.

With respect to the allegations of paragraph VIII the defendant lacks sufficient knowledge upon which to base an affirmation or denial.

## IX.

Alleges that it owns lands within the watershed of the Rio Mimbres which are part of the Gila National Forest. Those national forest lands in the Rio Mimbres Watershed located in Sections 23, 26, 27, 28, 32, 33, 34 and 35, T. 13S., R.10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T.14S., R.10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T.14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T.15S., R.10W., N.M.P.M.; all Sections in T.15S., R.11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T.15S., R.12W., N.M.P.M. were reserved for national forest use by presidential proclamation dated March 2, 1899. Those national forest lands in the Rio Mimbres Watershed located in Section 31, T.15S., R.9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T.16S., R.9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T.16S., R.10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T.16S., R.11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T.16S., R.12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T.16S., R.13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T.17S., R.9W., N.M.P.M.; Section 1, T.17S., R.10W., N.M.P.M.; Sections 6, 7 and 18, T.17S., R.11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18 and 19, T.17S., R.12W., N.M.P.M.; Sections 1, 2, 3, 4, 9,

10, 11 and 12, T.17S., R.13W., N.M.P.M.; and Sections 3, 4 and 5, T.17S., R.14W., N.M.P.M. were reserved for national forest use by presidential proclamation dated July 21, 1905. Those national forest lands in the Rio Mimbres Watershed located in Sections 32 and 33, T.19S., R.15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T.20S., R.15W., N.M.P.M. were reserved for national forest use by presidential proclamation dated February 6, 1907. Those national forest lands in the Rio Mimbres Watershed located in Sections 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T.16S., R.10W., N.M.P.M.; Sections 10, 11, 13 and 24, T.16S., R.11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T.17S., R.10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29 and 30, T.17S., R.14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T.17S., R.15W., N.M.P.M. were reserved for national forest use by presidential proclamation dated June 18, 1908. Those national forest lands in the Rio Mimbres Watershed located in Sections 5, 6, 7, 8 and 9, T.16S., R.11W., N.M.P.M.; Sections 5, 8 and 17, T.17S., R.11W., N.M.P.M.; Sections 19, 30, 31, and 32, T.17S., R.9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T.18S., R.9W., N.M.P.M. were reserved for national forest use by presidential proclamation dated May 9, 1910.

## X.

When these lands were reserved for national forest use, the unappropriated waters in and on such lands were withdrawn from private appropriation as against the United States and were reserved for use on such land by the United States to the extent necessary for the requirements and purposes of said reservation.

## XI.

The United States claims rights in and to the use of so much of the waters of the Rio Mimbres and its tributaries in and on lands of the national forest above described as is or may become necessary for the require-

ments and purposes of said national forest reserves having priority dates of the dates the lands were withdrawn for national forest use.

## XII.

The United States owns lands within the Rio Mimbres Watershed known as the Ft. Bayard Military Reservation. This reservation was established by the United States Army on August 21, 1866. By Executive Order dated April 16, 1869, the reservation of the Ft. Bayard Military Reservation was confirmed. By Executive Order dated July 14, 1906, the legal description of Ft. Bayard Military Reservation was modified to make the boundaries conform to those shown on the plats of the General Land Office. By this Order the boundaries were delineated as follows:

Beginning at a point on the east line of R.13W., New Mexico Meridian, seven chains north of the south line of T.17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to a point thirteen chains south of the north line of the southwest 1-4 of Section 10; thence east to the west line of northeast 1-4 of southwest 1-4 of Section 10; thence south to the southwest corner of same; thence east along the south line of same and along south line of northwest 1-4 of southeast 1-4 of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast 1-4 of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R.13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.



## XIII.

By Executive Order dated May 23, 1907, Sections 35 and 36, T.16S., R.13W. and the N $\frac{1}{2}$  of the NE $\frac{1}{4}$ , Section 1; the N $\frac{1}{2}$  of the NW $\frac{1}{4}$ , Section 2; the SW $\frac{1}{4}$  of the NW $\frac{1}{4}$ , Section 11; and the N $\frac{1}{2}$  of the NW $\frac{1}{4}$ , Section 12, T.17S., R.13W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawal of these lands as part of the Gila National Forest for forest purposes.

## XIV.

By Executive Order dated July 23, 1908, the W $\frac{1}{2}$  of the SW $\frac{1}{4}$ , Section 1; the E $\frac{1}{2}$  of the SE $\frac{1}{4}$ , Section 2; the N $\frac{1}{2}$  of the NE $\frac{1}{4}$ , the NE $\frac{1}{4}$  of the NW $\frac{1}{4}$ , and the SE $\frac{1}{4}$  of the SE $\frac{1}{4}$ , Section 3; the SW $\frac{1}{4}$  of the NW $\frac{1}{4}$  and Lot 4 of Section 10; all in T.17S., R.13W., N.M.P.M. and Lots 4, 5, 6 and 7, Section 6, T.17S., R.12W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawal of these lands as part of the Gila National Forest for forest purposes.

## XV.

By Executive Order dated November 13, 1908, the SW $\frac{1}{4}$  of the SE $\frac{1}{4}$ , Section 7, and the NW $\frac{1}{4}$  of the NE $\frac{1}{4}$ , Section 18, T.17S., R.12W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawals of these lands as part of the Gila National Forest for forest purposes.

## XVI.

By Executive Order dated June 22, 1910, the E $\frac{1}{2}$  of NW $\frac{1}{4}$  and the W $\frac{1}{2}$  of the NE $\frac{1}{4}$ , Section 7, T.17S., R.

12W.; the E $\frac{1}{2}$  of the NW $\frac{1}{4}$ , the SE $\frac{1}{4}$  of the NW $\frac{1}{4}$ , and the E $\frac{1}{2}$  of the SW $\frac{1}{4}$ , Section 1, T.17S., R.13W.; the E $\frac{1}{2}$  of the NE $\frac{1}{4}$  and Lot 1, Section 11 and Lots 3 and 4, Section 12, T.17S., R.13W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawals of these lands as part of the Gila National Forest for forest purposes.

## XVII.

By Executive Order dated October 22, 1910, the SE $\frac{1}{4}$  of the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 18, T.17S., R.12W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawals of these lands as part of the Gila National Forest for forest purposes.

## XVIII.

By Executive Order dated April 24, 1911, the NW $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 10 and the W $\frac{1}{2}$  of the SE $\frac{1}{4}$  and the NE $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Section 3, T.17S., R.13W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawals of these lands as part of the Gila National Forest for forest purposes.

## XIX.

Ft. Bayard was used for many years as an active military post and then as an Army hospital. In 1912, the administration of the hospital was transferred to the Public Health Service. On May 1, 1922, the administration of Ft. Bayard was transferred to the Veterans Administration. On January 2, 1941, all of the lands of Ft. Bayard Military Reservation except the SW $\frac{1}{4}$  of Section 25, the SE $\frac{1}{4}$  of Section 26, the NE $\frac{1}{4}$  of Section

35, and the NW $\frac{1}{4}$  of Section 36, all in T.17S., R.13W., N.M.P.M., were transferred to the Department of Agriculture to be administered as forest lands. The lands not transferred to the Department of Agriculture were administered by the Veterans Administration, as a hospital and a cemetery.

## XX.

On July 1, 1966, the following described property, together with the appurtenant water rights was conveyed to the State of New Mexico to be operated as a hospital:

All that part of the SW $\frac{1}{4}$ , Section 25; SE $\frac{1}{4}$ , Section 26; NE $\frac{1}{4}$ , Section 35; and NW $\frac{1}{4}$ , Section 36, all in T.17S., R.13W., N.M.P.M., Grant County, New Mexico, described as follows:

Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE $\frac{1}{4}$ , said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29°43'E., 37.30 ft. to Cor. No. 1-B; thence N.60°17'E., 21.25 ft. to Cor. No. 1-C; thence N.29°43'W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW $\frac{1}{4}$ , said Section 25; thence S.18°30'E., 2380.00 ft. to Cor. No. 3; thence S.57°59'W., 1573.40 ft. to Cor. No. 4; thence S.23°00'W., 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW $\frac{1}{4}$ , said Section 36; thence S.89°03'W., 2504.57 ft. to Cor. No. 8 on the South line of the NE $\frac{1}{4}$ , said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13'W., 1698.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50' curve to the left (chord bearing and distance N.45°54'W., 451.00 ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE $\frac{1}{4}$ , said Section 35; thence N.1°43'W., 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

*Excluding therefrom however;*

All that part known as the Fort Bayard Veterans Administration Cemetery, and described as follows:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE $\frac{1}{4}$ , said Section 26, bears N.75°30'W., 949.62 ft. dist.; thence S.80°00'E., 669.00 ft. to the Northeast Cor., thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N.81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

Total Net Acreage being: 467.991 acres, more or less.

## XXI.

Of that portion of the SW $\frac{1}{4}$  of Section 25, the SE $\frac{1}{4}$  of Section 26, the NE $\frac{1}{4}$  of Section 35, and the NW $\frac{1}{4}$  of Section 36 in T.17S., R.13W., N.M.P.M. not conveyed to the State of New Mexico for operation as a hospital, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE $\frac{1}{4}$ , said Section 26, bears N.75°30'W., 949.62 dist.; thence S.80°00'E., 669.00 ft. to the Northeast Cor., thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N.81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

A right to water for the cemetery needs from the existing water supply system on the hospital property was reserved in the deed of conveyance to the State of New Mexico.

## XXII.

The balance of the above described portions of Sections 25, 26 35 and 36, T.17S., R.13W., N.M.P.M., not conveyed to the State of New Mexico or retained for



use as a military cemetery was transferred to the administration of the Department of Agriculture for a forest service administration site.

### XXIII.

When the lands comprising Ft. Bayard Military Reservation were withdrawn for military use the unappropriated waters in and on such lands were withdrawn from private appropriation as against the United States and were reserved for use on such lands to the extent necessary for the requirements and purpose of said reservation. When the lands within the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard the unappropriated waters in and on such lands were further withdrawn from private appropriation as against the United States and were reserved for use on the Ft. Bayard Military Reservation by the United States to the extent necessary for the requirements and purposes of the military reservation. When the administration of the Ft. Bayard Military Reservation was transferred to the Department of Agriculture for forest purposes this constituted a valid change of use of the reserved water rights.

### XXIV.

The United States claims rights in and to the use of so much of the waters of the Rio Mimbres and its tributaries in and on the Ft. Bayard Military Reservation as is or may become necessary for the requirements and purposes of the national forest so long as these needs do not exceed the uses that would have been made of the waters in and on these lands for military purposes, had Ft. Bayard remained an active military post, with a priority date of August 21, 1866.

### XXV.

The United States claims rights in and to the use of so much of the waters of the Rio Mimbres and its tributaries in and on Ft. Bayard and in and on those

portions of the Gila National Forest further withdrawn from sale or other disposition for the protection of the water supply of Ft. Bayard as is or may become necessary for the use of the military cemetery on those lands with priority dates as of the dates the lands were withdrawn for the military reservation and for water supply protection of the said reservation.

WHEREFORE, the United States prays

(1) That each and all of the defendants owning lands or claiming water rights within the watershed of the Rio Mimbres be required to appear before the court and set forth fully any claims in and to the use of the waters of this stream and its tributaries.

(2) That the court determine the rights of each of the parties in and to the use of the waters of the Rio Mimbres and its tributaries and enter its decree setting forth such rights with a date of priority for each right.

(3) That the court determine and decree that the United States has the rights to divert and use so much of the water of the Rio Mimbres and its tributaries as is in and on the National Forest lands within the Rio Mimbres watershed as is or may become necessary for the needs and purposes of such National Forest lands and that such rights be declared to have priority dates for the respective lands as of the dates they were reserved for National Forest uses.

(4) That the court determine and decree that the United States has the rights to divert and use so much of the water of the Rio Mimbres and its tributaries in and on that portion of the Fort Bayard Military Reservation being administered by the Department of Agriculture for forest purposes as is or may become necessary for the needs and purposes of those lands as forest lands so long as these needs do not exceed the uses that would have been made of the waters in and on these lands for military purposes, had Fort Bayard remained an active military post and that such rights be declared to have a priority date of August 21, 1866.



(5) That the court determine and decree that the United States has the rights to divert and use so much of the waters of the Rio Mimbres in and on Fort Bayard and in and on those portions of the Gila National Forest further withdrawn from sale or other disposition for the protection of the water supply of Fort Bayard as is or may become necessary for the use of the military cemetery on those lands and that such rights be declared to have priority dates as of the dates the lands were withdrawn for the military reservation and/or for water supply protection of Fort Bayard.

(6) That the court enter its order enjoining all diversions and uses of water from the Rio Mimbres and its tributaries except in accordance with the rights and priorities as set forth in the Court's decree.

(7) That the court appoint a water master to administer the waters of the Rio Mimbres and the respective rights of all users therefrom in accordance with the orders and directives of this court.

(8) That the court enter such further orders and decrees as may be just and proper for an adjudication of the parties rights to the use of the waters of the Rio Mimbres and its tributaries.

VICTOR R. ORTEGA  
United States Attorney

By: /s/ Mark B. Thompson III  
MARK B. THOMPSON III  
Assistant United States Attorney

/s/ Donald W. Redd  
DONALD W. REDD  
Attorney, Department of Justice  
Attorneys for Plaintiff in  
Intervention

[Filed in State District Court Aug. 4, 1971]

## NOTICE OF HEARING

TO: ALL COUNSEL OF RECORD

Please take notice that the Honorable Irwin S. Moise, the Special Master heretofore appointed by the Court in this matter, has set a pre-trial conference for September 16, 1971, at 9:00 a.m., at the Luna County District Courthouse, Deming, New Mexico.

Some of the matters to be taken up at the pre-trial conference are the following:

1. Discussion of procedures for the litigation of matters by the Special Master.
2. The determination of which Sub-Files have contested issues of fact or law.
3. The setting down for hearing of the contested Sub-Files that are ready for trial.
4. The clarification of the claims of the United States of America for the Gila National Forest and the Fort Bayard Military Reservation.
5. Discussion of the nature and extent of flood water rights.

/s/ Peter Thomas White  
PAUL L. BLOOM  
PETER THOMAS WHITE  
Agency Assistant Attorneys General  
State Engineer Office  
Bataan Memorial Building  
Santa Fe, New Mexico 87501  
ATTORNEYS FOR PLAINTIFF-IN-INTERVENTION  
STATE OF NEW MEXICO EX REL. S. E. REYNOLDS

[Filed in State District Court Oct. 25, 1972]

### PRE-TRIAL ORDER

At a pre-trial conference held at the Court House in Silver City, New Mexico, on September 26, 1972, pursuant to Notice, the following transpired:

\* \* \*

(6) Concerning the various claims of water by the United States, the State Engineer agrees that the United States has a right to water under the reservation doctrine to the extent that such right satisfies the purposes for which the federal lands were withdrawn and to the extent that waters were unappropriated and available to be so reserved. However, the following legal questions are to be resolved by the Court:

(a) In the adjudication of a reserved water right of the United States must a specific quantity limitation be decreed by the Court?

(b) Does the United States have a right to change the use of waters previously reserved for the Ft. Bayard Reservation (military use) to uses incident to national forests on the remaining 11 sections of land being administered by the Forest Service?

(c) Was recreation use within uses for which water could be reserved prior to the Federal Multiple Use Act?

(d) Were the limits as to uses for which water could be reserved or withdrawn in national forests fixed as of the time that the national forest was created?

(e) If recreation uses were not within the original purposes of forest use, did reservation for this purpose arise as to forests previously created with the enactment of the Multiple Use Act?

(7) The United States and the State Engineer will submit simultaneous Briefs on the questions set forth

in (6) above, on or before December 1, 1972, and will respond to the Briefs of the other on or before January 1, 1973.

(8) The State asserts a question of fact to be present as to whether or not any unappropriated waters were available for reservation at the time of reservation or withdrawal by the United States for forest or other purposes. This question will have to be tried if no agreement as to the facts can be reached.

(9) A trial date on unresolved issues, both of law and fact, will be tentatively set for April 2, 1973, at the Court House at Deming, New Mexico. This is a date which we will try to meet, subject to unavoidable delays. Further notice will be given.

/s/ Irwin S. Moise  
IRWIN S. MOISE  
Special Master

[Filed in State District Court Nov. 30, 1972]

BRIEF FOR STATE OF NEW MEXICO

\* \* \* \*

POINT VI

RECREATION IS A PURPOSE OF NATIONAL FOREST USE TO THE EXTENT THAT ITS ENJOYMENT PARTAKES OF THE NATURAL CONDITION OF THE FOREST LANDS WHEN WITHDRAWN.

An extremely technical argument could be made in order to establish that recreation was not a valid purpose for the creation of a national forest until the passage of the Multiple Use Sustained Yield Act of June 12, 1960. (74 Stat. 215). We find the argument ill-advised and concede the above stated Point to the extent such recreation is of a magnitude revealed in traditional and historic use.

[Filed in State District Court Dec. 18, 1972]

PRE-TRIAL MEMORANDUM OF UNITED STATES

\* \* \* \*

*C. Recreation Was a Valid Use For Which Water Could Be Reserved On National Forest Lands Prior To The Federal Multiple Use Act.*

1. *The Courts have recognized Recreation as Valid Forest Purpose.*

The question of whether the withdrawal of public lands for national forest purposes reserved waters in and on those lands for recreational purposes has already been answered in the affirmative by the Supreme Court of the United States. In the case of *Arizona v. California, supra.*, the Special Master in his report found that the national forests in the lower Colorado River Basin, including the Gila National Forest, were established for the following purposes:

- 1) The protection of watersheds and the maintenance of natural flow of stream below the sheds;
- 2) Production of timber;
- 3) Production of forage for domestic animals;
- 4) Protection and propagation of wildlife;
- 5) Recreation by the general public. Masters Report, p. 96 (1960).

The Master then noted that water is used on these national forests for "recreation, domestic purposes, irrigation and stock watering." (Id.) The report of the Master was adopted and approved by the Court with respect to this finding. As noted above, this finding applies to the same national forest under consideration in this adjudication—the only difference being that it pertained to the lands on the other side of the watershed divide between the Gila and Mimbres Rivers.

The position of the Supreme Court in *Arizona v. California, supra.*, with respect to reserved water rights



was reaffirmed in 1972, in the case of the *United States v. District Court in and for the County of Eagle, et al.*, 401 U.S. 520. In this case, the Court stated:

It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona v. California*, 373 U.S. 546, the Federal Government had the authority both before and after a state is admitted into the union "to reserve waters for the use and benefit of federally reserved lands." *Id.* at 597. *The federally reserved lands include any federal enclave.* In *Arizona v. California*, we were primarily concerned with Indian Reservations. *Id.* 598-601. The reservation of waters may be only implied and *their amount will reflect the nature of the federal enclave.* *Id.* 600-601. (Emphasis added.)

2. *A Fair Interpretation of the Basic Statutes Includes Recreation as a Valid Forest Purpose.*

In this adjudication, we are concerned primarily with waters reserved for national forest purposes. The scope of the forest purposes has been questioned by the State of New Mexico in that recreation has been challenged as a valid forest purpose at the time the lands within the Gila National Forest were reserved for forest purposes. A review of the history of our national forests, however, clearly shows that recreation has been a valid purpose of our national forests from the time they were first created.

The Act of March 3, 1891, 26 Stat. 1103, authorized the President of the United States to create national forests by reserving public lands. We have evidence that can be introduced at the trial, if desired, that will establish that even before the forests had been reserved they had long been used for recreational purposes such as camping, hunting, and fishing.

The Organic Act of July 24, 1897, 30 Stat. 35, contains the following language:

No public forest reservation shall be established except to improve and to protect the forest within the

reservation, or for the purpose of securing favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessity of citizens of the United States; but it is not the purpose or intent of these provisions or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for minerals therein or for agricultural purposes than for forest purposes.

It has been suggested by some individuals that the language of this provision limits the valid purposes of the national forests to securing favorable conditions of water flow and to the production of timber. A careful reading of this entire provision as a unit, however, is necessary to grasp the real intent of Congress. It is noted that, under this statute, forests may be established (1) "to improve and protect the forest within the reservation," or (2) "for the purpose of securing favorable conditions of water flow and to furnish a continuous supply of timber." Furthermore, it is apparent from the balance of the paragraph that the real purpose of this provision was to insure that lands more valuable for the minerals therein or for agricultural purposes than for forest purposes were not included within the forest reservations.

The next paragraph of this statute reads as follows:

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March 3, 1891, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely to regulate their *occupancy and use* and to preserve the forests thereon from destruction.

This mandate for regulations for the occupancy and use of the forests indicates that Congress envisioned uses broader than watershed protection and timber production, namely, multiple use and utilization of all of the resources of the national forests.

3. *The Officials Charged with the Administration of the National Forests have Consistently Construed the Statutes Pertaining to National Forests as Authorizing Recreation as a Valid Forest Purpose.*

The Courts have held that great weight should be given to the interpretation of statutes by those officials charged with the duty of enforcing such statutes. *Udall v. Tallman*, 380 U.S. 1, 1965, *United States v. Southwest Potash Corp.*, 352 F.2d 113 (C.A. 10, 1965), cert. den., 383 U.S. 911; *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939). In the case of *Udall v. Tallman*, *supra*, the Court said:

The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; the Court must, therefore, respect it.

The official records of both the Department of the Interior and the Department of Agriculture show that from the very beginning the statutes with respect to national forests have been construed as including recreation within the valid purpose for which national forests were authorized.

In 1902, the first comprehensive forest regulations were published by the General Land Office under the title of *Forest Reserve Manual*. On page seven of this manual, there was provision for the leasing of lands near mineral springs under the Act of 1899, 30 Stat 908. At page eight of this manual, under the heading "Travel In and Across the Reservation" the following provision appeared:

All law abiding people are permitted to travel in forest reserves for purposes of prospecting, surveying, to go to and from their own lands or claims and for *pleasure and recreation*. (Emphasis added.)

In 1905, under the provisions of the Act of February 1, 1905, 33 Stat. 628, 16 U.S.C. 472, the responsibility of caring for and administering the forest reserves was transferred to the Department of Agriculture. In a letter dated February 1, 1905, to Gifford Pinchot, the director

of the Forest Service, the Secretary of Agriculture directed that questions of policy in the management of the national forests should be decided from the standpoint of the "greatest good of the greatest number in the long run." This has continued to be the policy of the Department of Agriculture in the administration of our national forests up to the present time. A manual entitled "The Use of the National Forest Reserves" was published by the Department of Agriculture in 1905 to govern the administration of the national forests. Regulation 42 of this manual provided that "hotels, stores, mills, summer residences and similar establishments will be allowed whenever the demand is legitimate and consistent with the best interests of the reservation. (p. 49.) This manual also directed rangers to "inform all hunters and travelers of the local game laws and to endeavor to prevent their violation. (p. 81.) By 1913, the annual report of the Forest Service to Congress showed 1,507,008 people under the heading of pleasure seekers had visited the national forests in that year. This report also contained the following passage:

Recreational use of the Forest is now growing very rapidly, especially on forests of considerable size. Hundreds of canyons and lakeshores are now dotted with camps and cottages built on land, use of which is obtained through permits of the Forest Service. This is an important form of use of the Forest Service by the public, and it is recognized and facilitated by adjusting commercial use of the forests, when necessary, to the situation created by the needs of the recreation seekers. Examples of such adjustments are the exclusion of stock from the locality where they would interfere with such a summer population, or the prohibition of use of certain canyons for drive-ways, and provision in timber sales for very light cutting or not cutting at all, close to lakes and elsewhere where it is desirable to preserve the natural beauty of the location unmarred, for the enjoyment of the public. (p. 41-42.)



The legislative history of the Multiple Use-Sustained Yield Act, 74 Stat. 215, 16 U.S.C. § 528, is quite revealing with respect to the purposes and uses of the national forests prior to enactment of that statute. The Department of Agriculture, in its letter recommending passage of the Act stated:

The national forests have long been administered under the policies of multiple use and sustained yield. The Department does not believe there is any question as to its authority to so manage the national forests, and the recommendation that this draft bill be enacted should not be so construed.

*4. Congress Has Consistently Recognized Recreation As a Valid Forest Purpose.*

In both the Senate and House Reports on the Multiple Use Act, the following language appears:

On the same day that the administration of the national forests was given to the Secretary of Agriculture by the Act of February 1, 1905, 16 U.S.C. 472, Secretary of Agriculture Wilson directed that questions of policy in their management should be decided from the standpoint of the "greatest good of the greatest number in the long run." Enactment of the bill would continue this policy. The administration of national forests has long been under the policy of the Multiple Use and Sustained Yield. House Report No. 1551, p. 2; Senate Report No. 1407, p. 3, 86th Cong. 2d Sess.

In 1899, Congress enacted two measures which recognized recreation as a valid purpose of the national forests. The Act of February 28, 1899, 30 Stat. 908, authorized the Secretary of the Interior "to rent or lease to responsible persons . . . suitable spaces on the ground near or adjacent to mineral, medicinal, or other springs in any other forest reserves . . . where the public is accustomed or desires to frequent for health or pleasure."

Later that year, Congress amended the forest service appropriation act to provide for protection of the fish and

game resources of the reserves directing its forest agents to aid in the enforcement of laws in relation to the protection of fish and game.

Beginning in 1907, the appropriation bills for the forest service began showing funding "to transport and care for fish and game supplied to stock the national forests or the waters therein." Eg. 34 Stat. 1270. Quite obviously, such appropriations were for recreational uses.

In 1922, Congress made the first specific appropriation "for the construction of sanitary facilities and for fire prevention measures on public camp grounds within the national forests." 45 Stat. 520.

\* \* \*

Respectfully submitted,

VICTOR R. ORTEGA  
United States Attorney

By: /s/ James B. Grant  
JAMES B. GRANT  
Assistant United States Attorney

/s/ Donald W. Redd  
DONALD W. REDD  
Attorney, Department of Justice



[Filed in State District Court Dec. 17, 1973]

TRANSCRIPT OF HEARING  
BEFORE SPECIAL MASTER  
ON OCTOBER 9, 1973

[3] THE COURT: All right, sir. Mr. Redd, are you ready to proceed?

MR. REDD: We would like to call Mr. Carlson.

THE COURT: Do you have any other witnesses I can swear at the same time?

MR. REDD: We have Mr. Norman Ritchey.

(WHEREUPON, witness were duly sworn by the Court.)

WESLEY CARLSON

Called as a witness herein, after having been first duly sworn under oath, was questioned and testified as follows:

EXAMINATION

BY MR. REDD:

Q. Mr. Carlson, would you state your name and present address and present occupation, please?

A. My name is Wesley Carlson. I'm presently employed by the United States Forest Service, Washington, D. C.

Q. And what are your duties in your present assignment, Mr. Carlson?

A. I handle a number of matters. One of these is the review of and help in developing environmental statements in connection with water resource development projects which might involve national forest system lands. Another one of my responsibilities is national administration coordination of water rights activities [4] within the Forest Service.

Q. Now, Mr. Carlson, what is your educational background?

A. I graduated from Colorado State University with a bachelor's degree in forestry in 1943, and I followed that with work on an advanced degree which I did not complete in watershed management.

Q. And at what school was this?

A. This was at Colorado State.

Q. Now, how long have you worked for the Forest Service?

A. I have to think a minute. Twenty-seven years.

Q. Then, essentially all of your working life has been with the Forest Service, is that correct?

A. That's correct.

Q. Could you review for the Court very briefly what your various assignments have been in the Forest Service?

A. I was an Assistant District Ranger and District Forest Ranger at two different districts. I was a Wildlife Staff Watershed Officer on two national forests. I was with the Inter-Mountain Forest Range Mountain Station, which is an arm of the Forest Service in flood control survey activities. I spent two or three years in our Division of Watershed Management in Ogden, Regional Office there. I was a Coordinator for the Inter-Mountain Region. And eight years I spent as Forest Supervisor at Challis National Forest in Idaho. And the last two [5] years, I have been in our Washington office.

Q. How many of these twenty-seven years that you have been in the Forest Service have you had some duties that concerned watershed management and utilization of water?

A. To a greater or lesser degree, practically all that entire time.

Q. Now, in your present assignment in Washington, do you have any responsibility over the inventories of the water rights in the various national forests?

A. Insofar as national priorities are concerned and attempting to allocate funds and also coordination of activities, we're trying to use a similar approach throughout the entire national forest system in completing our inventory.

THE COURT: Similar to what?

THE WITNESS: Well, one region would do it in a similar manner as the next region.

THE COURT: You mean uniform?

THE WITNESS: Uniform, right.

BY MR. REDD:

Q. Now, have some particular problems been run into in the inventory of the water uses with the present/future?

A. Would you repeat that?

Q. Have you run into any problems with respect to present and future needs for water in this inventory?

[6] A. Well, we found that it's very difficult to identify all the uses, and particularly on the first time around, it's like developing any new activities. You find certain things the first time around; when you take a new look at it, you find other things, items that you might have overlooked. Or you might find that in some instances, your—you have identified more than you need or less than you need. We found some of those kind of difficulties.

Q. Now, in running these inventories, have you found that there are some problems in estimating what the needs will be because of the state of development of our measuring methods for some of these needs?

A. Well, I think in most of our instances where we have diverted water, we're able to measure those very concisely. In the case of water needed in the stream for various purposes, we're just now in the process of trying to develop a methodology to measure these, and we're not too far down the road in getting that methodology organized. We have worked with various states, various state agencies, in trying to put together a methodology, as well as with other federal agencies.

Q. Now, Mr. Carlson, you stated that you have some supervisory capacities in coordination of the inventories from the national forests; is this correct?

[7] A. Well, I helped develop national policies to a degree, and then coordinate how that policy is organized and operated at regional levels.

Q. Now, could you tell us very broadly what the criteria are in itemizing an inventory in the various needs of the Forest Service for water for future need?

A. For future needs? Well, we have taken a very broad approach for future needs. Might use recreation as an example. About all we have to rely on is the projection, the trends of use and activities. And we can estimate then, based on the trends that we can identify, we can estimate what the future needs would be; insofar as livestock grazing is concerned, it's tied to the capacity of the land to handle livestock. If there is enough grass to graze livestock, a hundred head of livestock, we can identify reasonably close how much water they would consume.

Q. Now, are some of these needs that would be reflected in this things that would be more difficult to identify or to quantify?

A. Well, yes. I think water is needed for aesthetic purposes, for example, and in some instances, the aesthetic may have a higher value than most anything else you could put on that water at a given point. And that's an example where it's difficult to get agreement between [8] experts, as to just exactly how much you need.

Q. Now, these inventories that have been put together, what was the propose of these inventories?

A. Well, we have an inventory, water inventory, for many years, everyplace I have ever been. It was quite sketchy and incomplete, but we did have one of sorts to identify within the Forest Service, what our needs really were, and what our actual uses were. Then, as time went on, we recognized a need to also inform other people what our demands and requirements are. We have been notifying states as to our estimated uses and needs for several years now.

Q. You say you have notified the states of these needs? Has this been done all over the western states?

A. No, it hasn't. It's been done in those states where the inventories have been brought up to the point where we thought it was reasonably close as we could identify at the time.



Q. Have you ever considered that your inventory had reached that stage in the State of New Mexico?

A. No. People in this region, when I inquired as to where they hadn't notified the State of New Mexico, they felt it just had not been perfected adequately. But I think that perhaps they're getting much closer now.

THE COURT: Let me ask you, Mr. Carlson, this was [9] done state by state rather than forest by forest or anything like that?

THE WITNESS: No, sir, it's done watershed by watershed. We have a thing we call our PWI, project work inventory, which is a—well, I won't go into those details. But we identify various watersheds, and the inventory is completed by the watershed and then by the next larger drainage. You can accumulate this information for a particular watershed and drainage area. And then we're trying to accumulate it so that it can also be identified by state.

BY MR. REDD:

Q. Now, in setting up these watershed inventories within the national forests with respect to future needs, has the criteria been to include everything that would be within the forest purposes for which water could be used on that watershed?

A. Well, everything is, we reasonably feel, at this time. We have made no effort to go all out and identify all the difficulties on the land or this sort of thing that might be a possible thing in the future, but try to keep it in a practical vein.

Q. Now, by practical vein, do you mean the things that the water probably would be used for in actuality?

[10] A. Yes.

Q. And what are some of the things that would control whether the water would or would not be used?

A. Well, you have a use on the land which requires water, it probably would be used there. I'm not sure I fully understand the question.

Q. Well, is construction of structure sometimes necessary for some of these uses?

A. Oh, certainly.

Q. And is there any limitation on the construction of these structures?

A. I don't know of any limitation.

Q. What about your budget?

A. Oh, the budget. We have very limited funds within which to operate, and the Forest Service has never taken on any major water development that I know of.

Q. Do the desires of the local people ever have any bearing on the development of projects that might use water in an area?

A. Quite often. We have cooperated with a number of states where small fishing reservoirs have been developed. Fishing and other recreational purposes, this sort of thing. We have some impoundments that are needed for our own administrative use, but most of these are pretty small.

[11] Q. Now, do you have any familiarity at all with the inventory, the computer printout of the inventory of the Mimbres Watershed within the national forest in New Mexico?

A. I have looked at it, but I'm not personally familiar with the details of it.

MR. REDD: I have no further questions of this witness.

THE COURT: You may cross examine.

MR. BLOOM: Paul Bloom, Special Assistant Attorney General for the Plaintiff, State of New Mexico.

## EXAMINATION

BY MR. BLOOM:

Q. Mr. Carlson, first off, I believe you mentioned some uses made by other people than the Forest Service itself that complicates this study we're talking about, uses made by lessees or special-use permittees?

A. I don't recall making that statement.

Q. All right. In the course of making inventories, you're talking about, or the ones that are made under your general supervision in the forests in the United States, do those inventories routinely include, in the cate-



gory of present uses, all those uses now being made by people acting under special-use permits from the various national forests?

[12] A. No, I wouldn't include all of those.

Q. Would it include any of those?

A. Conceivably it could, if the water that was being used by a special-use permittee with a legitimate reserve use.

Q. And do I understand it, in your judgment of your job, that's your decision to make, as far as these inventories go?

A. Well, I wouldn't say that it is.

Q. Who would decide whether a fellow who had a special-use permit on a thousand acres of forest land, say for—for example, for a ski basin operation, ski lift and slope, and maybe the land rented for overnight facilities and all the other related recreation facilities of a ski basin—we will assume this is all happening inside a national forest under a special-use permit. Now, is that or is that not treated by the U.S. Forest Service as a reservation purpose?

A. The Forest Supervisor upon whose national forest the land lies, he is the one who normally issues the special-use permit. Now, if it's a much, much larger operation, that responsibility would rest with the Regional Forester.

Q. Possibly I'm not following you. Do I understand you to say each forest supervisor who issues under his local authority a special-use permit for ski basins has the [13] implied power to determine whether or not that's a use of water by the United States, or use of water under state law by the lessee? That's what I am getting at, is whether that's counted by the Forest Service, the water use associated with that ski basin? You don't have any national policies on whether such a water use would be a federal water use or a local water use?

A. Well, it would depend on the circumstances in each case, I think.

Q. Well, then, I think you're telling me that there is no National Forest Service policy as to ski basins, for instance? It might or might not be counted as a federal water use?

A. That's possible.

Q. I see. So if I ask you about the one up in Santa Fe or Taos or some others on partially or entirely on National Forest Service land, you would have to tell me to talk to the Forest Supervisor in each case to find out if this was claimed as federal use or something done under state law; is that right?

A. I certainly don't review all of those.

Q. But am I correct that as far as any national policy goes with the Forest Service, in your judgment, it would be strictly a local decision of the Forest Supervisor whether "he complied" under a reservation doctrine, or [14] leave it to the leasee to claim?

A. I presume it would become a contested matter, that it would be a decision for the Court.

Q. No. I type my question, Mr. Carlson, to the state to which you make inventories before you go into any course. I understand you're telling me there is no uniform national policy, just a matter that each supervisor who is in charge of an inventory can decide whether or not to claim this water use made by a special-use permittee for a ski basin as a federal use or as a local use?

A. No. I think this is spelled out pretty well in the Forest Service Manual.

Q. What does that say?

A. Some of the uses—there is a number of uses that are defined and would include such developments. If they are located on National Forest land, if it's a recreation use of the National Forest, and if the water that's being used there comes from the National Forest.

Q. All right. Now, we're getting to what I was originally asking about. I understand you're telling me now that your view is that anything, that you have a legal right to issue a special-use permit, you have the right to count as water use for a federal purpose of the forest?

[15] Q. All right. Let's take a ski basin. Say, take the one up at Santa Fe or anywhere in New Mexico. A man leases, gets a special-use permit for enough acreage and suitable site, and wanted to start a ski basin operation. He is going to use a lot of water and so he gets a permit from your Forest Supervisor, and he drills wells,

and he doesn't comply at all with state law, just believes he is acting under the authority of the United States and under his special-use permit. Do you or do you not have a National Forest Service policy when it comes to inventorying water rights in the National Forest with respect to how you treat this man?

A. Well, yes. I think we have a policy.

Q. What is your policy?

A. Well, I think I stated it before, that if it's a legitimate National Forest use, if it's located on the National Forest, and it's for a public recreation service, and the water is to be used on the National Forest, it comes from the National Forest, it could be claimed under reservation.

Q. You say it could be? I was following you right up to that point. When you say it could be, does that mean you leave the discretion entirely to the Forest Supervisor who is in charge of the inventory, whether he will do it, or is there some national criteria or [16] written policy, instructions, or manual guideline to tell him whether or not he should claim it, and if so, how he should measure it?

A. Insofar as the measurement, we don't have the techniques spelled out in our water rights activities, no.

Q. Well, I wasn't just asking how to measure. I'm still trying to get over the threshold problem. When you have a forest, you have a special-use permit, you have a ski basin,—

A. Yes.

Q. —do you have a national policy constructed under which your basin, your Forest Supervisor, is to claim that or not claim that, when an inventory is being made of Forest Service water uses in that watershed? When I have asked you this before, you told me that if it's a lawful purpose like recreation, which you assumed it is because you gave them a permit that the Forest Supervisor could do it. I want to know, must he do it, and under what authority and what guidance you have given him from Washington of how to handle that? If there is no such policy, I would appreciate you telling me that.

A. Well, I thought I had explained it to the best of my ability.

Q. Well, all right.

A. Since it is, then he could claim it, if it is legitimate [17] recreation use and legitimate facilities for public purposes on a National Forest.

THE COURT: Tell me this. Do you have any written manual or directory as to claims for water, or however you want to describe it?

THE WITNESS: Yes, we do.

THE COURT: Wouldn't that give the answer to the question he is asking you?

THE WITNESS: I think it would, yes.

THE COURT: Do you have it with you?

THE WITNESS: I'm not sure if I have a copy. I think I do.

MR. BLOOM: I would be glad to have the witness consulted and show it to me, if he can find it.

THE COURT: Can you get it quickly?

THE WITNESS: We're in the process of revising some of the wording in our manual, and here is our policy.

THE COURT: What are you referring to?

THE WITNESS: I'm referring to Forest Service Manual, Title 2500.

BY MR. BLOOM:

Q. Watershed Management?

A. Watershed Management, and under Section 254103, the policy is spelled out.

[18] Q. Would you read that into the record, please?

A. "Water necessary for the development, use, and management."

Q. Excuse me. Why don't you start up here?

A. All right. "Objective: The objective—" I have, "Forest Service is to obtain sufficient quantity of water in coordination with legal authority to provide for the development, use, and management of National Forest system resources, with due consideration for the needs of other water users." Now, you want to read on the policy?



MR. BLOOM: Just a second. Mr. Redd, can we agree to have this stipulated into the record, this whole page, so we don't have to read it?

MR. REDD: Stipulate that whole thing if you like.

THE COURT: Let's keep it down as much as we can. That page has got your policy in it, Mr. Carlson. I think it would suffice. Tell me, does it?

THE WITNESS: Yes, it has the policy statement as it relates to water necessary for development and use.

BY MR. BLOOM:

Q. I'm afraid it doesn't answer my question, but I would be delighted to have it in the record.

THE COURT: I wonder if any of the local attorneys— [19] do you have a zerox machine handy here? Just let us have it a minute, Mr. Carlson.

THE WITNESS: Okay. Now, one problem, if we go to other pages, I have some marginal notations which have to do with the possible revision of some sections of this manual, and they would not apply to our current manual policies.

THE COURT: All right. With that understanding, let's have that page, and have it zeroed and give him the page back.

BY MR. BLOOM:

Q. Mr. Carlson, in my brief reading of this page over your shoulder, I didn't see any reference to inventory. It doesn't talk about inventories, does it?

A. No, that probably doesn't.

Q. So what you have showed us as policy in your Forest Service national manual, it's a general statement of policies in respect to water. It says you're supposed to use water in proportion to the water available. You're supposed to use water reasonably; that sort of thing, right?

A. Right.

Q. Okay. Let's come back to this inventory business that Mr. Redd asked about on direct examination, which is of interest to all the parties in this case. You have

[20] identified, I think you have explained that an inventory of present and future uses of water for the Gila Forest in the Mimbres Drainage by local forest personnel, that's correct, isn't it?

A. That's correct.

Q. When was this made?

A. I'm not certain as to the original date, but it was revised some time this spring, 1973.

Q. Do you know whether the revision has been supplied to any agencies of the State of New Mexico?

A. I'm not aware that it has.

Q. Have—are you aware that the original was submitted to this Court and to the counsel in this adjudication so many months ago?

A. Yes.

Q. But you don't know whether the revision has been made available to us?

A. No, I don't.

Q. It has not been by you or your office?

A. No, it has not.

Q. Okay. Now, still trying to follow exactly how you handle the inventories locally,—and incidentally, are these subject to review in your office nationally before their finalization or approval, whatever is required?

[21] A. No, sir.

Q. They're simply a product of each local Forest Service administrative unit, watershed by watershed?

A. I think they're assembled and very carefully reviewed at the regional level within the region where they originate.

Q. Okay. I see. All right. Now, coming back to this problem of special-use permit, you would agree, wouldn't you, that in many forests in the western United States, a very considerable is not a dominant part of the water actually used in those forests is used by special-use permittees, as apart from use made by uniformed personnel of the Forest Service itself, isn't that correct?

A. I don't know that that's a fact.

Q. Okay. Then let me go back to fundamentals, and ask you, what are the largest class of water uses in the western United States? Then we can take it step by step.



A. Well, I would suppose it would be in-stream flows needed for various purposes.

Q. How do you classify an "in-stream flow" as a use?

A. Fishery studies, aesthetic purposes—I could expand that.

Q. We will accept your definition of water flowing in [22] the national water course without any diversions as use for the purpose of your answer.

A. All right.

Q. Now, I'm more interested in uses made by man-made diversions, either through wells or dams or ponds or other man-made works that divert and cause the beneficial use of water. What are the principal categories in such as these?

A. We divert water for irrigation of pastures, I suppose, would be one of our uses, for domestic purposes.

Q. Now, you say irrigation of pastures. Are you trying to improve on nature, or is this for grazing purposes?

A. No, grazing off our administrative livestock.

Q. You distinguish between that and livestock owned by leasees?

A. Right.

Q. Is the irrigation of pastures for the grazing by leasees or permittees for the forest an important class of use in the National Forest?

A. Not to my knowledge, anywhere.

Q. Could you continue?

A. The other diversions that we have—well, we divert water for campground sanitation systems.

Q. Those require relatively small diversions, don't they?

A. That's correct.

[23] Q. You're talking there about water spigots or small domestic wells and storage tanks and spigots for sanitary facilities at a campground, aren't you?

A. In some of the larger campgrounds, we have larger sanitation systems with the evaporative pumps and this sort of thing for treatment of the sewage.

Q. Yes.

A. And there again, the actual consumption is quite minor.

Q. All right.

A. We have some impoundments for—I guess we mentioned—livestock use. We have impoundments for fisheries and recreation, which would be small lakes. I suppose those are the principal uses that we have.

Q. All right. I note you have not mentioned, I think, this list either, water use by/and in association with the grazing of cattle owned by permittees or leasees, and you have likewise excluded water associated with recreation projects not directly constructed and operated by the Forest Service itself, for instance, the kinds I was referring to when I spoke of a large ski basin operating under special-use permit, both those classes of uses are fairly common with western forests, are they not?

A. That's true, they are. And water is used for those purposes.

[24] Q. All right. Are such uses customarily shown, to your knowledge, as Forest Service uses under the reservation doctrine—that is, Federal uses claimed under the reservation doctrine, and the inventories that have been made and are now being made in the program of inventory water rights that you have been describing to the Court?

A. Yes, I think they are.

Q. They are?

A. Yes.

Q. All right. In fact, in the inventories that's been submitted to the Court here, a very considerable part of the annual depletion or consumptive use is actually consisted of use made by grazing, isn't that true, in association with grazing operations?

A. I'm not that intimately familiar with the figures.

THE COURT: It could very well be.

BY MR. BLOOM:

Q. Do you know whether any—when the inventory, for instance of the Mimbres Drainage of the Gila Forest talks about stock water, whether it's talking about stock owned by the United States Forest Service or stock owned by leasees?

A. It's primarily owned by leasees.

Q. Right. You don't know of any administrative stock of [25] any substantial number being run in the Gila Forest in the Mimbres Drainage, do you?

A. I don't know of any.

Q. So if we can take those of all of the stock as belonging to leasees, then that brings me back to the question of your—of the origin of your national policy of handling those. Do I understand you correctly now as telling me that any use made by a leasee who has, in your judgment, a valid special-use permit, whether it be for a ski basin, or whether it be for grazing his own cattle, that any water use by any depletion in the forest caused by that permitted use is to be included in these inventories and is included as a National Forest use?

A. Under the conditions I mentioned previously, yes.

Q. So, I mean, under the conditions in any question—can you answer yes?

THE COURT: I don't understand the distinction you're making. I understand his answer was yes.

MR. BLOOM: But he said under the conditions of his previous answer, and I can't remember which answer he was talking about.

THE COURT: You can correct me, but I—if I understand you correctly, you said that if the uses of water were made on the reservation under a permit, that that would be counted as a Federal [26] use in your inventory?

THE WITNESS: That would be our policy, if the water comes from the reservation and is used on the reservation.

MR. BLOOM: Fine, thank you.

THE WITNESS: And if it's on proper use.

BY MR. BLOOM:

Q. Do you have any written instructions or guidelines from the Washington Office of the National Forest Service, U.S. Forest Service, stating that, stating the policies which you have just agreed with me to be the policies of the Forest Service?

A. The entire guidelines we have are in that manual that I had in my hand.

Q. Now, the page that you identified does not refer to inventory, does it?

A. No, there is another section.

THE COURT: Could you get that?

BY MR. BLOOM:

Q. If I could, it pointed out to me that on Title 2500, Watershed Management, it's duplicated on the second page, Part 3B, says under Forest Supervisor, it says: "The Forest Supervisor may be authorized to develop and maintain the inventory of the National Forest Service uses." And then somebody has inserted under that [27] "foreseeable needs."

THE COURT: Foreseeable needs. That refers to changes in process.

MR. BLOOM: Right.

THE COURT: Is that the section you were referring to, Mr. Carlson?

THE WITNESS: Anything that's written in there that hasn't been typed is not the current policy.

BY MR. BLOOM:

Q. So current policy does not include any reservation to foreseeable needs in your inventory, does it?

A. Yes, sir, it does.

Q. Where does it? At least, it doesn't in 3B, under Forest Supervisor; that's clear, isn't it?

A. Under Section 2541.3, Inventory of Water Uses, it states, "The Forest Supervisor will prepare and maintain inventory records to show (1) water rights and withdrawn lands that is valid against the United States; (2) existing and foreseeable future water requirements of National forest systems; and (3) a map record keyed to these inventories." These records should be brought up to date annually.

Q. All right. What further instructions are given in the current form of this watershed management manual to our Forest Supervisors in respect to telling them whether [28] they should or should not include in those inventories water uses made by permittees and leasees? Do you see any reference to that point in your manual?



A. Would you repeat that again, please?

Q. Be glad to. Mr. Carlson, my question again goes to some sort of uniform written policy from any language in that manual instructing Forest Supervisors what they're supposed to do with water uses made by leasees and permittees of the forest in respect to water uses made by them, by the permittees. Now, you have told, in your opinion, those things should be included by the Supervisor in the inventories. I want to know if you told them that in your manual, and if so, where?

A. There is a section, Reportable and Non-Reportable Uses, in here with no intent, in this Section 2541.12, that it be entirely all inclusive. But it includes a number of examples of reportable and non-reportable uses.

THE COURT: Is anything said in there about leasees or permittees?

THE WITNESS: Not specifically, no.

THE COURT: It's your view, though, if I understand you correctly, that those uses would be included under that direction?

THE WITNESS: That's correct. There is an item here with this which is National Directions, which [29] includes developed water for recreation area uses. It doesn't distinguish as between an area that we would have developed or some leasee would have developed.

THE COURT: Would it be of any help to us if we had that copied?

MR. BLOOM: I would be glad to have that in.

THE COURT: That page?

THE WITNESS: Well, maybe you would want more than just that page.

BY MR. BLOOM:

Q. How long is 2541?

A. It isn't really a tremendously long manual. Do you want to look and see what part of that you would like?

A. I would like to have all of that.

THE COURT: You can have them zeroxed, make three copies, please.

BY MR. BLOOM:

Q. We have established then, as I understand it, that Section 2500, Watershed Management, 3B, where it refers to inventories of national forest system uses, does not now refer to foreseeable needs, but the other section, 2541, breaking down the inventory, does, the one you have just read to us. It includes what you call foreseeable future water needs of the forest?

[30] A. I think the title is present and foreseeable.

Q. Present, yes. All right. I think that you have agreed with me earlier, haven't you, Mr. Carlson, that a very considerable part of the total depletion cost within some of the national forests, within the western states, is in fact caused by these permittees and leasees carrying on grazing and recreation activities under such permits?

A. Percentagewise, I have never made any analysis, but there is certainly some consumption there.

Q. Now, if we look at the present inventory that was made by people under your direction or at least your local Forest people, it shows something like, what, eighty-some acre feet of annual present uses? If you have, for instance, just one major recreational use in that watershed by a permittee or leasee for a recreation project—for instance, assume that a ski basin was feasible there or something of that kind—that one use of it, if it were a major use, it could without surprising you very much, double or triple that annual depletion, couldn't it?

A. Conceivably could.

Q. Yes. And in fact, you know, don't you, that there are in New Mexico a number of national forest locations where considerable blocks of government land have been [31] leased to, or permitted for ski basin operations under special-use permits?

A. I have heard there are some.

Q. Then you know that they—in the cases of Taos and Santa Fe, at least, actually involve considerable overnight accommodations, with restaurants and kitchens and restrooms and other recreational facilities, don't you? Or are you familiar with those?

A. I'm really not.



MR REDD: I wonder if I could ask for an offer of proof to connect this in with the Mimbres Watershed?

THE COURT: I think it would be more important if we limited it to Mimbres.

BY MR. BLOOM:

Q. All right.

THE COURT: I think we have got the general policy now. I don't think it makes any difference what they do up there.

MR. REDD: We're talking about probability, and it's all in the same state.

THE COURT: I don't know if there is any such probability.

BY MR. BLOOM:

Q. Are you familiar with the climate and snowfall condition [32] and recreation for winter sports in the Gila Forest?

A. Just in a very general way.

Q. Is it not true that there is generally throughout the western part of the United States a growing—a sharply growing public demand for winter sports, recreation opportunities?

A. I think there is for all kinds of recreation.

Q. In fact, the ski business is a booming business all over the west, isn't it?

A. Seems to be.

Q. And your forests are constantly being approached by people who desire to get special-use permits for ski basins and operations, aren't they?

A. I'm not involved in those things, but I suppose they are.

Q. Do you know in fact that the Forest Office in Albuquerque, the Regional Office, is in fact—right now has underway consideration of certain requests of Elk and other mountains in the state, where a private individual or business people have asked for the right to

develop new ski basins in New Mexico for winter sport complexes and recreational complexes on National Forest land?

A. No, sir, I'm not familiar with this.

Q. Are you familiar with that very large request for a multi-million-dollar winter sport recreation complex development in the Sequoyia National Forest which [33] recently had a great deal of attention through the environmental impact of that proposed project?

A. I don't know which one you're referring to.

THE COURT: For our purposes, Mr. Bloom, that we know that they do grant permits for this purpose and that they do use water.

MR. BLOOM: I was just trying to get beyond that into probability, but apparently this isn't the right witness to do that with.

BY MR. BLOOM:

Q. Now, that manual you showed me says that an area where water is scarce, you're supposed to use it sparingly. Is that a principle that the Forest Supervisor under your direction faithfully follows in making these inventories?

A. Insofar as I know.

Q. All right. How would you translate that policy directive into the situation of a forest which is in headwaters of a stream that was already very much over-appropriated in terms of water uses, if you understand my question?

A. Let's try that one again.

Q. Okay. Your forest manual says the Forest Supervisor is supposed to be governed by the policy objective in areas where water is scarce and in very great demand [34] locally. It's supposed to be used sparingly and reasonably. Bearing in mind those other demands for it, these non-forest demands, how do you translate that into the appropriation of an inventory in which you are making claims for future and foreseeable forest uses?

A. Well, I would translate that to mean that we are not going to waste water.

Q. Is that all?

A. I think that would be the primary consideration.

Q. Is there any instructions from your office to look for the over-approach when they make these guesses or estimates as to future requirements?

A. No, sir.

Q. Why isn't there? It seems to me that would be implicit in the directive you gave me, that you told them to use water, where it is scarce, sparingly. As I understand, you're telling me that the Forest Supervisors are entitled to ignore the fact of the complete appropriations or the chronic shortage of water of local streams when they start reading their crystal balls and guessing what they're going to use in the future; is that correct?

A. Well, the authority of the Forest Supervisors is somewhat broad as it relates to the particular land for which they have responsibility.

Q. All right.

[35] A. And they are directed to manage those lands for those various purposes, and in the process of doing that, there are physical limitations in what they can look outside for and accomplish in that regard.

Q. I'm not talking about physical limitations, only as to how much water comes down out of the watershed. I'm talking about a situation where the forest is in the headwaters, and there is an entire water-using economy consisting of towns and industries and individual domestic wells. You have got a Forest Service manual that tells your Water Supervisor to use it sparingly where it's scarce, but I understand you to say they're entitled to ignore the appropriations of water on this steam system when they make their estimate as to how much they will use in the future?

A. They will use a reasonable amount that is needed for National Forest purposes.

Q. Looking in isolation, a part on over-appropriated systems?

A. I don't know of any of them that are completely isolated.

Q. If they're not bound to look to the future, they're doing it in isolation as a legal matter?

A. That I don't know.

Q. You would agree, wouldn't you, that if the Court allows a national forest to develop additional uses—or you [36] just do it on your own, let's set aside the Court—you make an inventory and you such-and-such-present and such-and-such-future needs, then you start developing your new uses that haven't been used before, and you're at the top of an over-appropriated system, that by exactly the amount that you increase you have decreased the supply? I mean, that is just a matter of physics?

A. Hydrologically, it may or may not be correct.

THE COURT: Due to shortening your examination, looking at the second paragraph, 2541.14, it says, "In drainage where water has been completely appropriated under state law, subsequent to the reservation date, use of water for National Forest system purposes will be expanded on a more careful evaluation of all water uses and needs to fully justify such expansion. Non-National Forest use of water has been established under state law. The management and benefits of forest uses and activities depend upon the particular water supply," and so forth. Is that what you were getting at?

MR. BLOOM: Yes, sir. I believe that covers the point. If perhaps the witness hadn't understood my question, he could perhaps have called my attention to that, but that does go to the point [37] I was asking about.

THE COURT: If it would help the witness, there is a copy of 2541.

BY MR. BLOOM:

Q. Then, if I understand the provisions which Judge Moise has just read in 2541.14, it is a matter of policy that the Forest Service is reluctant to, in the opinion of the National Forest; is that correct?

A. We are reluctant to do that, yes.

Q. All right. I assume that's for the reasons I mentioned, that it has a direct economic impact on those people, doesn't it?

A. Normally it does.



Q. Yes. Do you know whether the Mimbres Stream System is a fully-appropriated or over-appropriated stream system?

A. No, I'm not aware of that.

Q. Why did the Forest Supervisor revise the inventory for the Mimbres Watershed of Gila National Forest?

A. It's our policy that the inventory be reviewed annually and updated where any errors, corrections or changes might have been discovered.

Q. In other words, you have an inventory which includes a component called future uses, and then as each year of that future becomes past, it is revised, your inventory, [38] and checked on to see whether you have called the shots correctly?

A. That might be part of it, or we may have overlooked a diverted use, or we may have abandoned a diverted use which is then removed from the inventory, whichever kind of correction is needed.

THE COURT: Or you may have developed some new potential use?

THE WITNESS: Possibly.

BY MR. BLOOM:

Q. For how long, Mr. Carlson, if you have, have the National Forest lands of the western United States been used extensively for ski basin operations?

A. Well, are you talking strictly now about recreation-type skiing?

Q. With associated lodging facilities, sir, yes, sir.

A. I really don't know too much about it, but I do know that there were some developed ski areas in Colorado in the thirties, probably fairly early in the 1930's.

Q. In National Forest lands?

A. In National Forest lands, and probably before that. I'm sure there were ski jumps there that were developed in places of rather a minor beginning.

Q. Well, the larger national forest ski basin facilities have principally gone in since the Second World War, [39] haven't they?

A. I'm sure they have been materially expanded during that period.

Q. Are you then able to tell us today that you are—you or the Forest Service—able at this time to anticipate with certainty all potential recreational uses of water on the National Forests?

A. No, sir.

Q. In fact, it is conceivable, is it not, that just this one whole class of major water-using facilities for which ski basins were developed in the thirties, forties, and fifties are new and equally large and unforeseeable? Now, unforeseeable recreational use may develop in the eighties or nineties of the century?

A. There have been all kinds of recreational developments, such as the ski-mobiles and this sort of thing that have come along, snow-mobiles, lots of people enjoy them at the National Forests, where it's reasonable to do so. I think through the years we find all kinds of new things to do with the American public.

Q. Yes.

THE COURT: But that's what you are talking about, possible long-term leases for development of a recreational subdivision—

THE WITNESS: Are you talking about, say, [40] summer-home-type things?

THE COURT: Yes.

THE WITNESS: No, I think we're just about out of that business on National Forest lands. As I understand our current program, we're not getting into developing any new ones of those.

THE COURT: Or permitting it to be done?

THE WITNESS: Only on a very minor basis where there may have been something already in the developmental stage in the past.

BY MR. BLOOM:

Q. Now, Congress could change your policy on that, couldn't they?

A. That's possible.

Q. The population is steadily growing in this country, and the demand for summer homes in high country will no doubt continue to grow in this century, won't it?



A. It's true, but in a number of places where these things have grown and expanded and almost got out of hand, it's not a—in some of those places, those lands have been deeded over as town sites or gone out of the reservation. They're not National Forest lands anymore.

Q. Are you aware, Mr. Carlson, that in certain forests in the Pacific North Drainage areas, it is accepted, at least experimentally accepted as management practice, [41] to irrigate native timbers?

A. I have heard that some companies are doing this.

Q. Are these companies acting under leases or permits from the United States Forest Service?

A. Not to my knowledge.

Q. You're not aware that this practice is being done in forest lands?

A. Well, it's done on forest lands, but not national, not to my knowledge. Now, there are some exceptions to that. We do irrigate our nurseries where we grow young trees for planting, and we do have some seed orchards which are primarily for seed production, which are in the nature of timber stands. But these are rather small areas, and occasionally we do practice irrigation on some of those.

Q. Logging is one of the lawful purposes of the Gila Forest and Mimbres Drainage, isn't it?

A. Right.

Q. And if sometime in the future the policy of Forest Service is such as to allow, and assume further that the economics of the lumber industry was such as to encourage the irrigation of natural timber to enhance growth and commercial profits in logging operations, that's a theoretical potential for water use in the Mimbres Drainage, isn't it?

[42] A. I suppose it could be; I don't know.

Q. And as you told me, that technique is being used in the Pacific Northwest on timber companies?

A. On private timber land.

Q. Now, isn't it essentially your job and that of the Forest Supervisor to make these inventories to plan the wise, long-term use of Forest Service property interests in waters and public waters?

A. That's part of the job.

Q. Isn't it easier for you and the Forest Supervisor to have this job of administering and conserving the publicly-owned properties that you know what you own?

A. I'm not sure I understand that question.

Q. Well, if your job is to conserve and administer to the public, wouldn't you agree with me that it makes your job easier and more certain if you know exactly what it is that you own and that you're supposed to be conserving?

A. We, of course, are approaching that question through our inventories, which are continually updated.

Q. Wouldn't it necessarily make your job easier and the Forest Supervisor's job easier if we could waive the foundation, and in every watershed in the country where you have responsibilities, wouldn't that take a lot of the uncertainty and confusion out of your job?

[43] A. I don't see that it would.

Q. You wouldn't then have to worry about the effects you were having on other people and whether you were using too much or too little? You would know exactly what your property was and exactly what your neighbor's property was, wouldn't you?

A. We would know that.

Q. It would add certainty to your operation and clarity, at least?

A. It would add certainty; I suppose it would.

Q. Yes. The only thing it would do is keep you from going above that limit. After that, it would only be a disadvantage?

A. It would do that.

Q. Yes.

MR. BLOOM: I have no other questions.

## EXAMINATION

BY MR. REDD:

Q. If you had an adjudication and it cut off certain valid forest rights, would that help your administration?

A. No.

Q. Would an adjudication make any more rain fall on the forests?

A. Not that I know of, no, sir.

[44] Q. Mr. Carlson, you mentioned earlier that certain inventories had been supplied to some of the other states and were a little more advanced?

A. Yes.

Q. And when these were supplied to them, was any forwarding letter, stating what the purpose of this inventory was?

A. Yes.

Q. Do you have copies of any of those with you?

A. I did have them here, but I must have left them on the table.

Q. I would like to have these marked as exhibits. This is a letter notifying the State of Washington as to sending a copy to the State of Washington. This is for the State of Wyoming and this is for the State of Colorado.

MR. BLOOM: Could Mr. Redd tell us what the relevance of the letters written would be?

MR. REDD: Yes. I would be very happy to tell you. I want to show by these that these were not intended as limitations on the water rights, that they were not intended to be a final inventory, but the purpose of these was to advise the state of what the best estimate was of the amount of water that would probably be used in the future, so that they could use these for planning purposes.

MR. BLOOM: Wouldn't the best evidence rule cover [45] the situation, that it seems to me that the document which isn't yet in evidence ought to speak for itself?

THE COURT: Let's not argue. My only desire would be to keep out any surplus stuff.

MR. REDD: Yes, sir, Your Honor. Just the letter in each case is all I desire to put in. The other is there if they want to examine it, but the letter in each case is all that we really want.

THE COURT: I see here, for example, on this address to Denver, Colorado, August 1st of '73, June 18, '69; August 1st, '73. All right. Have them marked. Mark these, Mr. Reporter.

BY MR. REDD:

Q. Mr. Carlson, I hand to you a copy of what has been marked as U.S. Exhibit 1 and ask you to identify it?

A. This is a letter that was written by the Regional Foresters in the northern region of the United States Forest Service, notifying the State Water Engineer in the State of Washington as to the water uses requirements and rights inventory of the U.S. Forest Service in the Northern Region within the State of Washington.

Q. Now, I show you what has been marked as United States Exhibit 2, and ask you to identify it?

A. Exhibit 2 is comprised of three separate letters [46] written to Mr. Floyd Bishop, State Engineer for the State of Wyoming, notification of current and future, under the reservation principal on National Forests in Wyoming. The first letter was dated August 8, 1969. The second letter was an update, which is dated May 19, 1970. And the third letter is a future update of the original inventory, which is dated August 1, 1973.

Q. Now, Mr. Carlson, I show you what has been marked as U.S. Exhibit Number 3 for identification.

A. Number 3 is essentially the same as Number 2, except that it's the notification to the State Engineer for the State of Colorado, and it is also three separate letters, dated June 18, 1969, an update of May 19, 1970, and a further update of August 1, 1973.

Q. Now, Mr. Carlson, is the purpose for these inventories stated in that letter?

A. Yes, sir.

Q. And could you summarize for the Court what is said with respect to the purpose of these inventories?

A. I could read that. The letter outlines the type of matter—or material that is being furnished to the State Engineer, that it is a notification of current and future contemplated water uses under the reservation principle. It explains a little bit about the print-out sheets which were included, tells about the numbering [47] system. And there is a paragraph here to enable you to see at a glance the existing and foreseeable uses of both surface and underground waters as we see them at this time. A summary has been attached, so there is also a summary of what the uses are as would see them now or at the time the letter was written.



Q. Now, is anything stated in these letters with respect to the intent, as to quantity in our rights, as to setting a limit upon our legal rights? By ourselves, I mean the Forest Service of the United States, rights as to the use of water?

A. All of these letters show that it's a notice in the interest of the quantity. It's not intended to limit the quantity.

MR. REDD: I have no other questions.

THE COURT: Do you want these admitted?

MR. REDD: Yes, sir.

THE COURT: Do you object?

MR. BLOOM: We object. He didn't write them, and in the second place, they are irrelevant because they are to officers of other states involving other stream systems not within this suit. And furthermore, Mr. Redd has already told us that they aren't in respect to the Mimbres, that they give notice to the state officials. So since [48] what was done here is not done in New Mexico, I don't see the relevancy.

THE COURT: They will be admitted for what they are worth. You can develop what wasn't done here.

#### EXAMINATION

BY MR. BLOOM:

Q. Do you understand correctly, from either your earlier testimony or Mr. Redd's statement, that the comparable letter to the two has not been prepared and sent to the State Engineer of New Mexico?

A. That's correct.

MR. REDD: I can perhaps at this time—perhaps at this time it would be desirable to remind you and Mr. Bloom that a letter was sent with the inventory to the State of New Mexico, which does contain very similar language to this.

THE COURT: Well, I have a copy dated July 21, 1972.

MR. REDD: Yes, sir, Your Honor.

THE COURT: I am wondering if that is a record in this case?

MR. BLOOM: No, Your Honor. As far as I know, it's not.

MR. REDD: If not, perhaps we should have it admitted as evidence at this time.

THE COURT: I think perhaps you should.

[49] MR. BLOOM: How about if you withdraw the other three? It seems to me if we're going to follow relevance, if a letter has been addressed to the New Mexico Water Officials—I gather in this case you're talking about the letter addressed to me? I'm not a water official, but for the purpose of this case, it would seem to me that that's the only one of any relevance at all.

THE COURT: The others don't hurt anything and I don't know how the language compares because I haven't compared it, but it occurs to me that—I don't know how we're going to get it in the record if we don't have it copied. This is a rather voluminous deal, and as I say, I'm anxious to keep the record down as much as possible. But it seems to me that—

MR. BLOOM: There are a lot of copies around. You're talking about the whole inventory?

THE COURT: I'm talking about the printout.

MR. REDD: Your Honor, all I was suggesting that be admitted at this time was just the forwarding letter, since this is—

THE COURT: You may offer it. Have it marked and you may offer it.

MR. REDD: At this time, Your Honor, I offer what [50] has been marked as U.S. Exhibit 4, which is a letter dated July 21, 1972, to Mr. Bloom, Mimbres Valley Irrigation Company versus Tony Salopek, No. 6326, and signed by me on behalf of the Assistant Attorney General for the Land and Natural Resources Division, forwarding certain papers to Mr. Bloom. This is offered.

THE COURT: Any objection to that?

MR. BLOOM: I have an awkward situation. If it's offered, it's unsworn testimony, and Mr. Redd is here and can take the stand and take the oath and give that testimony. If it's not offered for the truth of the matter asserted, I don't understand what the relevancy is.



THE COURT: It will be admitted for what it's worth. And I take it the last paragraph is comparable to the language of the others? The first part of it is the other thing?

MR. BLOOM: The letter which you have just identified, Mr. Carlson, for Mr. Redd was a cover letter with an attachment?

THE COURT: I don't know that Mr. Carlson has ever seen it. There it is.

THE WITNESS: I didn't see this one.

[51] BY MR. BLOOM:

Q. With a bundle of documents consisting of a computer printout sheet and other material composing inventories for the Mimbres Drainage of the Mimbres Watershed of the Gila Forest, does it not?

THE COURT: The first part—it's just the last paragraph, I think.

BY MR. BLOOM:

Q. Yes. There are a group of copies of withdrawal orders that are not—

A. Right.

Q. You have a bunch of printouts, don't you?

A. Right.

Q. Which are Forest Service printouts? Take your time and examine them.

A. Might take quite awhile.

Q. I don't want you to study them intently, Mr. Carlson. I just want you to identify them as National Forest computer printouts constituting water right claims for the Gila Forest and Mimbres Drainage; can you so identify them?

A. I couldn't, because I'm not familiar with all the numbers, but I assume that's what it is. Watershed 025—

A. It lists current foreseeable national water use, doesn't [52] it?

A. Right. I presume that's correct.

THE COURT: Could we put it this way, Mr. Carlson? Is that the form of the inventories as they come out of the computers?

THE WITNESS: This is the general form, and it varies in different states, because the different states wanted it in a little different form, and we have tried to work with the state in developing it.

THE COURT: Let me ask you this in connection with these Exhibits 1 through 3, with the Washington, Wyoming and Colorado letters. Was there a printout such as this?

THE WITNESS: Yes, sir. It was a large printout.

THE COURT: Plus a summary?

THE WITNESS: Plus a summary.

BY MR. BLOOM:

Q. You have identified this—you can identify that as being for the Mimbres Drainage?

A. I'm not that familiar with the particular numbering on it.

Q. All right. You said those other three that Mr. Redd has introduced took the form of cooperative efforts with the state officials; is that correct? They were [53] prepared with State water officials; is that correct?

A. Yes.

Q. Yes. Has the Forest Service in the State of New Mexico such a cooperative program underway with the State water officials?

A. In my inquiries with our Regional Officer personnel, they haven't informed me that they have made contact with the State of New Mexico.

Q. But is there such a cooperative program underway?

A. Yes.

Q. Has the Forest Service ever sent, to your knowledge, such a letter that you have identified to the State water officials of those three states, to the State Engineers of New Mexico?

A. Not to my knowledge.

Q. In fact, are you aware whether the inventory which was handed you in respect to the Gila National Forest

was made, at least in part, in response to the filing of this lawsuit, or at least submitted by your attorney to myself as attorney for the State of New Mexico, in connection with this pending lawsuit and quite apart from any cooperative efforts you may have in being with the State Engineers?

A. I had heard that, yes.

Q. All right. So this one differs somewhat from those other [54] three, that it is not the product of a cooperative state/federal effort, something that was turned over to an attorney in connection with the pending lawsuit to adjudicate water rights?

A. I don't think the inventory differs a bit.

Q. I mean the submission differs?

A. That might be.

Q. Now, let's look into what exactly the inventory is. These letters you have identified at Mr. Redd's request, including the letter from Mr. Redd to myself, all use the phrase essentially that the inventory represents existing and foreseeable consumptive uses of the fourth service on land reserve from the public domain. Those are correct statements, are they not? I'm reading now from the one sent to the Washington State Department of Water Resources?

A. Yes, those are correct statements.

Q. That's a correct statement? You had told me earlier, hadn't you, that you, your office, and the Forest Supervisors, include in this classification of Forest Service uses for forest land uses made not only by Forest Service personnel themselves and by the public—general public using the forest land, but also by permittees and leasees of Forest Service land?

A. In some instances.

[55] Q. Well, now, it—you are including both your own uses, public uses, and permittee uses, and you're including, as you say here, existing and foreseeable uses. What category of possible uses is omitted from these inventories?

A. I don't know at this point.

Q. In other words, when the inventory was made, each of these inventories—I am talking particularly of the one

for the Gila Forest—it was intended to be a full, comprehensive survey of present—that is, existing, and all foreseeable Forest Service uses which would be claimed by the United States Forest Service, both for its own use, its own administrative operation, uses by the general public of the forest land, and uses by permittees and leasees? Both for the present and the future? That's correct, isn't?

A. Mr. Bloom, I don't like to belabor a point, but there is one point that does bother me, because there are—we do issue special-use permits, which involve people who carry water, for example, off the national forest. And in our permits, we do not claim to give them any right to the water, nor do we claim the water itself.

Q. You're talking there about, for instance, where a community ditch or private irrigation heads on forest, but it's used by non-forest people?

[56] A. Right.

Q. When I talk about permittees and leasees, I'm talking about people who are using water on forest lands?

A. Yes.

Q. For National Forest purposes, such as recreation, et cetera. All right.

THE COURT: Well, I don't know if that's a National Forest purpose or not.

THE WITNESS: Yes.

BY MR. BLOOM:

Q. As a matter of fact, in this inventory which I'm going to offer in evidence, a very considerable portion of the claim is for stock water purposes?

THE COURT: By permittees?

MR. BLOOM: Yes. The witness has already told me there is no administrative stock raised in the forest.

THE COURT: My only question about your question is that I don't think you should expect the witness to alter the meaning of the last paragraph of Mr. Redd's letter to you.

MR. BLOOM: I don't want him to alter it. I just want to find out what the earlier paragraph means.



THE COURT: He says as to future users. It's not to be construed as a claim of the United States, nor [57] is it—that it is the current estimate and subject to revision.

MR. BLOOM: Yes, I understand. And the witness told me earlier on cross examination that, as I recall, Your Honor, these are subject to constant revision and year by year or every few years.

THE COURT: The form of your question would have permitted answers that would have been contrary to that.

MR. BLOOM: I would like to withdraw that question.

BY MR. BLOOM:

Q. I'm not asking you to give any legal opinion on what the purpose or the effect of that inventory is, just asking you if, as a matter of fact, when it's made, the people who make it are required to and do, to the best of their ability, consistent with federal law, and your manual of watershed management, truthfully and comprehensively set down every water use they can fit within those criterias, whether they're made or to be made by the Forest Service itself, by it leasee or permittee or by the general public using the forest land, including both those then existing and those foreseeable?

A. I certainly hope so.

Q. Yes. That's the purpose of it?

A. Right.

[58] Q. Right. So the only defect—leaving aside my legal effect, as a factual matter, the only thing that might be omitted is that your people might have failed to think of something, either to find one that is presently existing that should have been included or to think up one that five years later or ten years later or twenty years later you would discover somebody wanted to use?

A. Those would be the primary omissions.

Q. Okay. As far as you know, the inventory that I have shown you, the printout for the Gila National Forest which I submitted to you, includes the Mimbres Watershed, as far as you know; that is made on the same basis, isn't it?

A. As far as I know.

Q. You don't know whether it includes any of these in-stream fishery promulgations and aesthetic purposes, do you?

A. I'm not positive on that point.

Q. I would move at this time the admission of the inventory.

THE COURT: You'd better have it marked.

MR. BLOOM: Yes, sir. I'm sorry, I thought we had had it marked earlier. I believe the witness has identified it as the Forest Service Water Quantity Report for the Gila National Forest. I offer it in evidence at this time.

[59] THE COURT: Any objection, Mr. Redd?

MR. REDD: No.

THE COURT: It will be admitted.

MR. BLOOM: I have no further questions.

THE COURT: Do you have some further questions?

MR. REDD: No further questions.

(WHEREUPON, State's Exhibits A and B were admitted into the record.)

(WHEREUPON, a five-minute recess was held.)

THE COURT: Your next witness, Mr. Redd?

MR. REDD: Mr. Norman Ritchey.

NORMAN RITCHEY

Called as a witness herein, after having been first duly sworn under oath, was questioned and testified as follows:

EXAMINATION

BY MR. REDD:

Q. Would you please state your name, address, and present occupation and employment?

A. I'm Norman Ritchey. I'm working for the Gila National Forest in Silver City. I'm in charge of the Soil and Water Management Program on the Forest directly under the Forest Supervisor.

Q. And how long have you worked in this present job?

A. I have been on the Gila in that particular job for [60] three years now.



Q. Could you relate your educational background?

A. I have a bachelor's degree in Forest Management from the University of Idaho in 1961. I have a master's degree in Watershed Management from the Colorado State University in 1964. I have advanced work in Hydrology at Arizona State University, but no degree in it.

Q. Now, how many years have you worked in the preparation of inventories of water needs, present and future water needs?

A. Since 1968. I began this work on the Lincoln National Forest.

Q. Now, did you have any responsibility in the preparation of the computer printouts of the inventory of present and future water needs in the Gila National Forest?

A. Yes, this was my responsibility.

Q. And when did you first begin this work?

A. In late 1970.

Q. Now, could you relate how this inventory was prepared?

A. This inventory, we started off with a form which was eventually used by keypunch operators for the fillout in filling this in. We inventoried to the best of our abilities the present uses, and we tried to estimate foreseeable uses.

Q. And what did you base your estimate on for the foreseeable [61] uses?

A. Our best guess.

Q. Now, in making your best guess as to future uses, were you attempting to estimate what the uses would actually be, or what was the most that could conceivably be used in the exercise of valid forest purposes?

A. We fell short of that second objective. We wound up with a short-range foreseeable. We tried in a revision to make a long-range, but we cannot predict the future that close. This thing became so dynamic in the few years that I was working on it that it changed constantly.

Q. Now, the printout that was submitted to the Court, did this include the entire Gila Forest?

A. I haven't seen the printout. It was supplied—

THE COURT: I think the Reporter has it.

THE WITNESS: This printout that I have in my hand here is for the Mimbres Watershed only. It does not include the whole Gila Forest.

BY MR. REDD:

Q. This is the Mimbres Watershed only?

A. That's correct. This Mimbres Watershed is coded Number 25 in the start of this and the middle and the finish is Number 25.

Q. And there are no water uses inventoried in that that are [62] not part of the Mimbres Watershed; is that your testimony?

A. Not from my quick scanning here.

Q. Now, you state that there had been some updating made since that computer printout was originally made, is that correct?

A. That is true.

Q. And what was the nature of these changes that were made at that time?

A. Well, as we learned more and as we denoted errors in my original work—and there were a great number of them—

THE COURT: What would the nature of the errors be, omissions?

THE WITNESS: Omissions.

THE COURT: Omissions of yours that you weren't aware of?

THE WITNESS: That's true. Mostly that and additional uses which we were not aware of at the time we made the inventories, that the additional uses would be made.

THE COURT: You mean for future uses?

THE WITNESS: Both future and current. For example, a number of stock watering facilities were built.

THE COURT: That you hadn't been aware of?

[63] THE WITNESS: That's true.

BY MR. REDD:

Q. Now, you have mentioned stock watering here. In making your estimates, do you feel that the inventories

accurately reflect the future development that might be made with respect to stock watering?

A. No, I don't think so.

Q. And could you explain why this does not?

A. Well, for one thing, the—how much use is made out of a stock watering facility is nearly impossible to estimate. Again, our limit is our best guess.

Q. Why is it impossible to estimate this?

A. Well, a variable number of stock would use any one facility. It might be that one of the greatest use of stock watering facility is by wildlife, a tremendous use that cannot be inventoried. Another thing, the variable water levels that occur in a stock tank, and that greatly affects the evaporation rate from a stock tank. There are many more variables.

THE COURT: How big are these stock tanks?

THE WITNESS: They again vary in size from a tenth of a surface acre to some of them over half a surface acre. They almost—none of them are much over one or two acres in capacity.

[64] BY MR. REDD:

Q. Now, in speaking of stock tanks, do you mean a metal or masonry tank?

A. In inventory, a stock tank was an earth structure.

Q. An earth structure?

A. Right.

Q. And these are small, what would be known as check dams or ponds?

A. Small ponds.

Q. Yes. Now, does one of the variables that you would have a problem with in estimating future needs for stock watering, the number of installations for watering, the number of watering places that would be on the forest land?

A. Would you rephrase that?

Q. Well, now, at the present time, you have how many stock watering points or watering holes on the Mimbres Watershed in the forest?

A. I don't have the tally figure on that. The earth stock tanks, I recall, are about a hundred of them that are

there presently. There are additional developments, such as springs, rock dams, which we call artificial springs. And water catchments and wells and this sort of thing, so there is several hundred at least.

Q. Are there particular problems that arise if you do not [65] have sufficient watering points?

A. There certainly are. With the present number of stock, the only way they can utilize an allotment is to be well distributed over the allotment, and watering is the only way we can do this.

Q. What are the problems that arise if you don't have proper distribution?

A. The land is ruined through erosion. The flood runoff is greatly increased.

Q. In other words, the cattle congregate around the existing—

A. Right. We would have very poor storage of the land if we allowed this to continue.

Q. Then it would be desirable to have more stock watering points?

A. It's absolutely essential.

Q. And that would distribute the grazing more evenly?

A. That's true.

Q. What are other advantages that would come from this?

A. Well, it would help wildlife quite a bit. This in turn would help a very important aspect of recreation on the forest, and this is our hunting.

Q. Has there been an erosion problem with the Mimbres Watershed from the distribution of the stock watering points?

[66] A. This is one of our chief problems.

Q. What are the things that limit the number of stock watering points that are installed?

A. The practicality or potential for developing good water. We prefer having springs all over, but we don't, so we have to go to other alternatives. One of these is a stock tank, for example.

Q. Is water piped sometimes from one area to another?

A. Yes, it is.

Q. Do these things cost money?

A. They certainly do.



Q. Where does this money come from to develop these?

A. Appropriations through Congress.

Q. Do the appropriations you receive have a bearing on the amount of stock watering points you put in?

A. They certainly do. They have limited this thing greatly.

Q. Now, in making your estimation of the amount of water for stock watering, did you take into effect—did you take into consideration all of the possible points that could be installed, considering prudent range management?

A. We don't know where these points are. You have to go through a range analysis and a great deal of planning. There are no good range water development records available.

[67] Q. Then at the present time, would you say that this inventory is a practical and accurate prediction of the future needs for stock watering purposes on the Mimbres portion of the Gila Forest?

A. No, it is a primary estimate only.

Q. Now, I think another of the things that are—what are some of the other things that are shown for water in the Mimbres Watershed of the forest?

A. There are a variety of things. The National Forest, domestic water for its administrative sites and water for its horse pastures. There is a recreation development plan which needs to be revised. It is preliminary, but we did the best we could in estimating the future campground water needs.

Q. You mentioned wildlife. Are there any inventory included in this printout for future needs for water, exclusively for wildlife as opposed to livestock.

A. This is one of our chief omissions in this. We have got a lot more work to do here and it's going to take quite some time to get this together, wildlife geologists, and myself, others who can help us on this.

Q. What would be the difference in these watering points from those that are just for livestock?

A. Wildlife watering on the Mimbres would be up in the high rocky country. You don't have much livestock [68] getting up in there. And yet this is literally the last

refuge for our deer and elk and smaller game. And I think we can include fisheries in this. These fish are a rare and endangered species. The Gila trout depend upon stable stream flow and water and so on.

Q. Is that Gila trout which you mentioned as being a rare and endangered species, is it found within the watershed of the Gila Forest?

A. Yes, sir, it is.

Q. Any other part of the country?

A. Just within the Gila Forest, to the best of our knowledge.

Q. Is there any particular place that this Gila trout is found?

A. In the upper MacKnight Creek, which is a tributary of the Mimbres River.

Q. Now, was a figure shown in this inventory for future needs for the Gila trout?

A. There was, but the figure is too small, as we recently found out in talking with our fisheries.

Q. What was this figure based on at the time, if you know?

A. It was the minimum stream flow that would be needed in order to develop fish stream improvement structures. In other words, the pools which the fish can survive in.

Q. Do you know at the present time what amount of water is [69] needed for the protection and the promulgation of Gila trout in the MacKnight Creek area?

A. No, it's going to take additional time to survey this.

Q. And are these studies being made at the present time?

A. No, we plan to in the future.

Q. What's the limitations on making these studies?

A. I don't quite get the meaning of the question.

Q. Well, you stated that it was necessary to make further studies, and you stated that these studies were not being made at this time. Plans, I should say. Why not?

A. Limited manpower.

Q. Limited manpower?

A. Just myself and one wildlife biologist, who is brand-new in the forest.



Q. Now, is fishing for the public permitted in the area where the Gila trout is found?

A. That is closed to fishing now.

Q. That's because of the Gila trout being a rare and endangered species?

A. That's true.

Q. Are there other streams that are live streams within the Mimbres Watershed that are open to the public for fishing?

A. The upper Mimbres River—when I say "upper," because the—in normal years, the Mimbres is dry for a stretch [70] through the Gila National Forest, but the upper watershed has a fishery potential in it. Another place that is small, but gets some fishers is Iron Creek, which is a tributary of Gallinas Creek and tributary of the Mimbres River. And that is all we have.

Q. Are these fished extensively by the general public?

A. Yes, they are.

Q. And is there any cooperation between the State and the Forest Service on the fishing of these areas?

A. Yes, there is.

Q. And what does this consist of?

A. Generally, the fish improvement structures are small dams of this nature. They have helped us with the funding; we have provided the manpower and have done the work. They also stock these streams for us.

Q. And do they issue fishing licenses for these?

A. That's the prerogative of the State to do this. They issue the fishing licenses and regulate the fishermen.

Q. Now is any figure shown in your printout for water to maintain these fishing streams?

A. Yes. This is an underestimate, as we know now.

Q. You state that it is an underestimate at the present time?

A. Yes.

Q. And can you explain how this came about, that you [71] realized that it is now an underestimate?

A. Based on what we needed to develop the stream for a fishery, the very minimum flow, and this would involve the actual building the structures in the streams to create pools.

Q. Now, does the size of the stream in any way limit the amount of fishing that is available?

A. It certainly does.

Q. And you state that at the present time these figures are inadequate?

A. Yes.

Q. Could you at this time come up with a figure that would be adequate for these streams within the very near future for future foreseeable uses?

A. I do not know until we develop and perfect the survey method for in-stream flow requirements.

Q. In other words, you don't even have the method at the present time?

A. No, I don't.

Q. Now, Mr. Ritchey, some mention has been made here of a structure or proposed structure by the name of Noonday Lake. Could you tell the Court what Noonday Lake is, or what it is proposed to be?

A. Noonday Canyon is a tributary of the Mimbres River. It is a canyon which flows through the village of San [72] Lorenzo. There is in these inventories a proposal for a fishing lake on Noonday Canyon. This stems from a recreation development proposal by the three C's in the thirties which was carried into recreation management plans made in the forties, which was further developed by the New Mexico Fish and Game Department in the fifties. And the proposal is now involved in the Bureau of Reclamation Proposal on the Mimbres project. This is where it's developed at today. It originated from a three-C project that would have been built, except that the three C's were disbanded in 1941 at the start of World War II.

Q. Was a figure shown in your inventory for a projected—for the needs for water for Noonday Lake?

A. Yes, there was. But that figure is preliminary. It was a guess that I made on the data that I had available at the time.

Q. Now, what are some of the things that would control the amount of water that would be used in Noonday Lake?

A. Well, the actual consumptive use would be evaporation from the lake surface and possibly that evaporation

would be greatly reduced because of the location of the lake, down in a deep canyon. It only gets the full effect of the sunlight in there, oh, just a limited part of the day. It's shaded quite a bit. That would greatly [73] reduce evaporation loss, which is possibly an error in that estimated figure I have.

Q. Now, are the plans—

THE COURT: Would you say that you overestimated the use there, you think?

THE WITNESS: I could have, yes.

BY MR. REDD:

Q. Now, are the plans on Noonday Lake sufficiently advanced that you know the exact size of the structure that will be built there?

A. No, it would depend now on the Bureau of Reclamation's designs, and they have two alternatives, two dam sites, in other words. And I do not know at this time in what state the development—that this is in in the Bureau's records.

Q. When this was proposed as a CCC project, was any planning data to the point of saying what size of project it would be, what size of a dam—

A. I have been trying to find the old CCC records, but I cannot.

Q. So you don't know whether they did or not?

A. I do not know.

Q. Would the size of the structure have a direct bearing upon the amount of water that is consumed by this project?

[74] A. That's true, it would.

Q. How about the amount of rainfall that you get in Noonday Canyon; would that have a bearing on it?

A. That's always considered in the design. The evaporation loss is estimated. We actually have a gross evaporation loss. And then we subtract the precipitation from that. However, the precipitation is naturally very variable.

Q. Do you have a map with you that shows the general area of the Mimbres Watershed?

A. I do.

Q. Could you produce it at this time, please?

MR. REDD: Your Honor, this map is being—I would like to have it placed on the board here for him to identify points and to illustrate the general location of these things. This is a U.S.G.S. Topographic Map, official map that I am offering, and I would like to have it solely for the purpose of illustrating this information at this time.

THE COURT: Are you suggesting it doesn't need to go in the record?

MR. REDD: I don't think it's really necessary. It could go in if the Court desires to have it in.

THE COURT: The reason for my question is, I just wondered how he can get it in the typed record [75] without some point of reference?

THE WITNESS: This could be redrafted on a smaller scale.

THE COURT: That's not necessary. The scale isn't going to cause any problem. It's just a question of whether it would—do you have copies of it or anything like that?

MR. REDD: We can have copies made for the record, Your Honor, and submit this with the original.

THE COURT: I think if he is going to refer to points, we ought to have some reference in the record.

MR. REDD: Very well. We will—I would like to have this identified. I would like to have this marked as U.S. Exhibit Number 5.

BY MR. REDD:

Q. Mr. Ritchey, on this map that has been marked as Exhibit 5, there are some product blue lines that have been traced along certain streams. What does that indicate?

A. In our opinion, the permanent waters in the Mimbres Watershed on the National Forest.

Q. Now, in your inventory, did you include any needs for these areas that are marked to indicate permanent flow for fish and for other purposes?

[76] A. Those with the fishery potential we put in the minimum flow, and again, this underestimate of two cubic feet per second. That included the upper Mimbres River, the upper MacKnight Creek, and Iron Creek. Now, the



others are very important stock watering in the Mimbres Drainage, in which the stock drink directly out of the stream.

Q. And those others that are shown are not streams that you indicated need for fisheries, is that right?

A. We do not think they have a potential for fishery development, because—mainly because they're just too small.

Q. Now, perhaps with a pen or something, you could indicate where Noonday Canyon is on this map?

A. Noonday is not shown in blue.

Q. Maybe you could put "A" in the area of Noonday Canyon?

A. So the village of San Lorenzo is here, and this is Noonday Canyon.

THE COURT: Is it still down here? Does it say so?

THE WITNESS: Yes.

BY MR. REDD:

Q. Could you indicate on this map where the Noonday Lake would be located?

A. Right about this location right here, very close to the forest boundary.

[77] THE COURT: And where you put the "A"?

THE WITNESS: Right.

BY MR. REDD:

Q. Now, does surface flow normally run from Noonday Lake into the Mimbres River?

A. No.

Q. Where does that water go?

A. Most of it is either evaporated from the channel or goes into the alluvial, the soil material.

Q. Is there any way that we could accurately measure the amount of water that runs from Noonday Canyon into the Mimbres River?

A. No way that I know of. We could put a stream gauge at the dam site. That would only be the water going past the site.

THE COURT: And as I understand that, most of that does not get down to the main stream?

THE WITNESS: No.

THE COURT: On the surface?

THE WITNESS: Except during flood season. There is some that goes down through San Lorenzo during flood season and causes quite a bit of damage.

THE COURT: And some goes down underground, I assume?

THE WITNESS: Yes. A great deal is also evaporated [78] from the surface as the stream fans out and comes out of the mountains there.

BY MR. REDD:

Q. Now, the confluence of MacKnight Creek and the Rio Mimbres, is that somewhere near the town of San Lorenzo?

A. That's about approximately ten miles upstream. MacKnight Creek comes on in.

Q. I beg your pardon, I mean Noonday Canyon?

A. Noonday is right below San Lorenzo.

Q. You mentioned there was some flood damage occasionally from Noonday Canyon in the village of San Lorenzo; is that correct?

A. That's correct.

Q. Now, has the village of San Lorenzo taken any position with respect to a structure on Noonday Canyon?

A. Yes. One of the citizens has written a letter to a local resource conservation development committee, asking for possible help in some sort of floodwater retardation on this stream.

Q. Now, would the proposed Noonday Canyon Lake provide some flood protection for the village of San Lorenzo?

A. It would provide a great deal.

MR. BLOOM: It's just a legal matter. I take it Mr. Redd is arguing that flood control is an authorized purpose of the National Forest, and I [79] just wondered if he had made that point at the pre-trial conference, or if it has ever been specified that the United States is claiming flood control structures. Because if it's not, I don't see the relevance of the question.

MR. REDD: I think this goes back, Mr. Bloom, to the statement in the policy that was brought out from our previous witness, that the National Forest uses would be controlled by the local area and the local conditions, including the need for use and water and the use for water and so forth. And this is one of the considerations that would be going into the development of this project, that it would help the people downstream. Although this is not a valid Forest purpose, but this could be for the justification of such project.

THE COURT: All right. Proceed on that basis.

BY MR. REDD:

Q. Now, did your project—I think you have already testified that your inventory did include some water for Noonday Lake, is that correct?

A. That is correct.

Q. Did you state your opinion as to whether or not this figure was an accurate figure as to what will actually be used there, if Noonday Lake is constructed?

[80] A. I pointed out that that figure was preliminary and that the final figure would rest with the Bureau of Reclamation's design.

Q. Now, does your inventory show water for any other proposed lake, for fishing and recreation?

THE COURT: May I interrupt just a second? The Bureau of Reclamation, what's their interest? Is there some irrigation at San Lorenzo?

THE WITNESS: It originally started with irrigation in the Mimbres project, which included a large dam on the Mimbres.

THE COURT: Well, is there a Reclamation Park and Irrigation District in that area?

THE WITNESS: There may be, but I do not know for a fact.

THE COURT: For example, I don't think that the Bureau of Reclamation builds dams, either for wildlife, fish, or flood control. I may be wrong.

MR. REDD: Your Honor, perhaps I could state here that although the primary purpose of the Bureau of Reclamation, originally at least, was to build irrigation projects.

THE COURT: Multiple?

MR. REDD: Many other things often enter into these, and many other projects in this day and age [81] are only a small part of the Reclamation's projects. There are people that have the expertise and people that plan and develop these projects.

THE COURT: I thought they still had to have a major reclamation purpose. I might be wrong.

MR. REDD: I think that the figures will show that today that there is more water going into municipal use and commercial use than there is into reclamation.

THE COURT: All right. Go ahead.

BY MR. REDD:

Q. Now, did your inventory show any need for any other reservoirs in the Mimbres Watershed of the National Forest?

A. There were other reservoirs proposed in those. The Forest included two on Gallinas Creek, the upper and lower, and one called Cooney on the upper Mimbres.

Q. Is this listed specifically under those reservoir names?

A. Yes.

Q. Now, at the present time, would you say that those figures that are shown in there are accurate estimates and predictions of the amount of water that would be used by these projects if built?

A. I have no figure for those, because I have nothing to [82] base them on.

Q. Then you made no estimate as to the amount of water that would be used?

A. No estimate, other than the fact that the project proposal existed, and they did emanate from old CCC proposals.

Q. Now, what is your judgment with respect to these projects, if built? Would they be valid projects in the prudent management of the National Forest resources?



A. They certainly would be valid. The fisheries—recreation is one of the great shortages on the Mimbres. There is very little fishery opportunity there.

Q. Could you identify the upper and lower Gallinas Reservoir, with the letters "B" and "C"?

A. Upper Gallinas is "B" and lower Gallinas is "C".

Q. Now, I notice that these are shown on segments of streams which do not show perennial flow, is that correct?

A. That's true.

Q. And would it be correct to say that the only flow that you would get there would be after heavy, during and after heavy precipitation?

A. Yes.

Q. Now, generally speaking, is there surface flow from those streams where the upper and lower Gallinas [83] Reservoirs are proposed that runs into the Mimbres River?

A. Only floodwaters; there is no permanent waters that I know of.

Q. And to your knowledge, is it presently possible to estimate the amount of water that flows from those streams into the Mimbres River?

A. It would be very hard to do?

Q. And you state that no water was shown for these reservoirs?

A. No, because of the preliminary nature of the data. No indication of a possible dam height or even of the material the dam would be built out of.

Q. Has serious consideration been given to the building of these projects?

A. Yes, they are in the Bureau of Reclamation proposals.

Q. And you state that these first date back to the CCC days?

A. Yes. For these, it is hearsay. It was based on the people that I obtained my data from.

Q. Now, you mentioned another reservoir by the name of Cooney Reservoir?

A. Yes.

Q. Could you identify with the letter "D" where Cooney Reservoir would be?

A. That's on the upper Mimbres.

[84] Q. And this is in the area where perennial stream flow is shown, is that correct?

A. Yes, we show it, but because of the nature of the stream channel, while the surface flow goes all the way some years, it retreats back up above.

Q. When was this project first proposed, to the best of your knowledge?

A. This again was a CCC project or proposal, and then in the fifties, was picked up by the New Mexico Department of Game and Fish for consideration, and is now in the Bureau of Reclamation's proposal.

Q. You state that this was picked up by the Department of Game—State Department of Game and Fish? Did they advocate the building of this structure?

A. Yes, they had a set of plans and designs, but again, I can't show a figure for this.

Q. You did not show any figure for that?

A. No.

Q. To the best of your judgment, would the—would the construction and operation of this reservoir as a fishing and recreation reservoir be a valid use within the prudent management of the forest resources in the Mimbres Watershed?

A. Yes, it would.

Q. Are there any other reservoirs that there are proposals [85] for to your knowledge that were not adequately inventoried as to future uses in your inventory of the Mimbres Watershed for future needs?

A. These were the primary ones, other than the large Bureau proposal, and I have no data on that other than future campground needs.

Q. Now, with respect to these future campground needs, are there variables with respect to that?

A. Quite a bit. It would depend upon the planning of the campgrounds as to how much water is needed, how many wells, and where they could be located.

Q. What are some of the things that water would be used for in a campground site such as this?

A. Primarily domestic. Drinking water primarily, but also for sanitation facilities.

Q. Now, would there be a substantial difference in the amount of water for this camp or a relatively smaller camp or if it were a larger camp?

A. I don't think so. I think the pressure on the fishing lake would determine this. The campgrounds may have six units, but a particular unit, it may have a great many more people using it.

Q. What about the type of sanitation facilities around which are needed to go in there?

A. Our regulations indicate that we have to provide some [86] type of sanitary facility. Were it a larger project that would attract a great many people, that would involve something like a water flowing system for the water—or waste material, and to treat it.

Q. Would this be required for a smaller campground?

A. Possibly not, but this depends on the regulations that exist at the time that this is constructed.

Q. These could change and change the amount of water that is needed there?

A. Could change drastically in the last few years.

Q. In view of this, would you say that your figure that you put in your computer printout for a recreation site at that area would be accurate?

A. It could be very inaccurate.

Q. Would it be possible at this time to give an accurate estimate as to the amount of water that would be needed for the campgrounds at that site?

A. No, because this would depend upon the design.

Q. Now, can you state that a figure was given for this particular project at the lower Mimbres site for the amount of water that would be used there?

A. Yes. I have since learned that this would be incorrect, because of the type of sanitation facilities which we would be required to have.

Q. Now, this figure that was again there was only for the [87] campgrounds, is that correct?

A. That's true.

Q. And no figure was given for a reservoir and evaporation from the reservoir?

A. No figure for the large reservoir, because it was not a National Forest proposal. The smaller lakes were National Forest proposals.

Q. Now, if that lake were built there, would it be on National Forest land?

A. Yes, it would.

Q. And would it provide forest-type recreation facilities?

A. Yes, it would.

Q. What would that consist of, those forest-type recreation facilities?

A. It would be a boat ramp up to four campgrounds. I do not know the figure for the camping units. Possible concession there and administrative facilities.

THE COURT: This is at what location?

THE WITNESS: This is on the main Mimbres River at MacKnight Canyon.

BY MR. REDD:

Q. Could you mark that with a letter "E"? Now, Mr. Ritchey, do you know of any other instances where your computer printouts would not be accurate today, because of the inability to accurately predict the future needs for [88] water?

A. Well, one of them would have been—this is somewhat of a serious area—water needed for road construction and road maintenance, and each year, the water trailer that we have uses quite a bit of water in the Mimbres Basin to prepare roads for grading, and several of them are oil. Water was used for this, and this would—this should go into an update.

Q. This is not shown in the present—

A. It is in the present update, the most recent one made, but this is an example of an error. Now, the sanitation facilities for Mimbres Reservoir for foreseeable use, I will have to some how come up with an estimate on how much water would be needed for a layout of that size, and get this into foreseeable use. It would be very hard to come up with anything accurate on this.

Q. Is there any timber of loggable and lumbering quality in the Mimbres Watershed?

A. There is, but it is very limited. I doubt that very little logging will ever occur there again, because the timber that is there is more valuable for recreation, for



aesthetic. However, there are some places in MacKnight Creek that have been logged and may again be logged. But there is a very, very limited area.

Q. And that could depend upon numerous variabilities as to [89] whether or not this logging would be done; is that correct?

A. Yes, it would.

Q. Do you show any needs—any figures for future needs for logging purposes in your inventory?

A. No, I did not.

Q. And that was because you assumed that logging probably would not be done?

A. I assumed it would not be too important, but then again I could be wrong. We now know that, for example, that Kennecott may go back to the use of converter poles instead of using natural gas to extract oxygen out of molds and vat copper. If that's the case, logging may resume in this area. I just learned that two weeks ago.

(WHEREUPON, a short recess was held.)

BY MR. REDD:

Q. One more question, Your Honor. Now, Mr. Ritchey, with this inventory that was originally prepared or as updated, was it ever intended as a complete estimate of all of the possible valid forest uses of water within the Mimbres Watershed?

A. No, it was not. This thing was very complex, and this was the result of our first go-round.

Q. What was it intended as?

[90] A. To perfect survey method, for one thing, and to build on it from there. The original intention was to come up with a document which would help the State Engineer and the Forest Service plan future water needs.

Q. And was there an intent to submit that to the State?

A. No, not this one.

Q. And when was there an intent to submit it?

A. At such a time when we felt we had good, accurate data.

MR. REDD: I have no further questions.

THE COURT: Well, I know that you wouldn't be willing to close the door on yourself, would you; after you had built on it, would you still try to keep it open for future changes?

THE WITNESS: We certainly would, because when I think of what's happened in the last five years, if I projected this into the future, it's tremendous. It's dynamic and I guess I get older and wiser too.

MR. BLOOM: Your Honor, before I begin, I want to express a little surprise that notwithstanding all the discussion on the direct examination of this witness, but that inventory has not been identified or introduced through the testimony of this witness, or that quite apart from the testimony of this witness, it has not been heretofore [91] been made known or supplied to the other parties in the case. The Court will remember, I think, that the matter of this inventory was raised at the first pre-trial conference.

THE COURT: Some discussion on it?

MR. BLOOM: Yes, and I asked at that time if the Court didn't agree that it would be useful and be formulating their position and pursuing possible compromises that this inventory be made available to the State and pursuant—it was my clear understanding that the Court agreed it would appropriate, and I am a little surprised, in view of the status of the matter, that we could have gone so far as a commission and finished a revised inventory on that.

THE COURT: If I understand the situation correctly, Mr. Bloom, it's not material, in the sense that they don't want to be bound by this one or that one, whatever it shows?

MR. BLOOM: I just want to point it out that not only is it indefinite, but it is invisible.

#### EXAMINATION

BY MR. BLOOM:

Q. Now, Mr. Ritchey, I believe that you said that in this recent revision of your earlier inventory for the [92] Mimbres Watershed, you added three reservoirs; is that right?

A. Three fishing lakes, something like that. They were already always in there.

Q. You are telling me now that there are consumptive uses set out for four reservoirs or lakes?

A. For the one we had best data for, but I could not pin down the others yet. The proposal existed and, as a matter of accurate and complete reporting, they were put in there.

Q. Right. They were in the forest, but no consumptive use was associated with them?

A. That's correct.

Q. All right. And you are unable to guess what a consumptive guess would be for them now, if any?

A. I have not seen figures. As I said, that would be on the design.

Q. Has Congress authorized the Forest Service to build any of those four reservoirs?

A. Not the Forest Service, no.

Q. Has it authorized any agencies of the United States to construct these four reservoirs?

A. Not to my knowledge, the construction, but they certainly are authorized to plan them.

Q. Yes. Well, of course, there are thousands of things [93] being planned. None of these four has been authorized or had a single thin dime appropriated for its construction to any federal agency, has it?

A. That's correct.

Q. And in fact, you mentioned that Noonday and at least two of these other three new ones that you have come up—

A. They're not new.

Q. Well, the ones you talked about with Mr. Redd in addition to Noonday, come out of some sort of Bureau of Reclamation report, is that right?

A. No. These were from data on file on the Gila Forest or from the people I had talked with in trying to substantiate the data.

Q. All right. Has any agency of government made a formal report finding favorability and feasibility of constructing Noonday, Cooney, and the two on Gallinas Creek?

A. No, they are in the process of this.

Q. So you don't know the outcome of those studies?

A. No.

THE COURT: There are feasibility studies being made?

THE WITNESS: Yes. We had word about a year ago that they planned to go into Noonday and Cooney and possibly the others.

[94] BY MR. BLOOM:

Q. Do you know whether those are feasibility or reconnaissance?

A. Core drilling is definitely feasibility.

Q. By the Bureau of Reclamation?

A. Yes.

Q. I understand you to say these—

A. No, you said Forest Service study.

Q. No, I said Bureau of Reclamation Studies?

A. I'm sorry, they are Bureau of Reclamation proposals now.

Q. Which are under study and some were reconnaissance or feasibility level investigations, but not authorized?

A. That's correct.

Q. Are you aware that all water uses, all consumptive uses of water under Reclamation projects per se aren't 1902 Reclamation Law as amended are in fact to require strict compliance with state law in acquisition of water rights, and no Bureau of Reclamation in the history of the western states has ever been built since 1902, the doctrine of water rights?

MR. REDD: Your Honor, I think he is asking for a conclusion of law from this witness, and I'm not sure that the conclusion of law he is asking for is accurately stated.

THE COURT: I sustain the objection. You can ask [95] him whether the Bureau of Reclamation—do you know whether the Bureau of Reclamation has ever built a project since 1902 without having acquired water rights under state law?

THE WITNESS: No, I'm not familiar with that.



BY MR. BLOOM:

Q. We can save that for legal argument. They can not, as a matter of law. Now, so you have simply thrown this in as potential uses because the Bureau of Reclamation is thinking about them or studying them?

A. I do not know what agreement the Bureau of Reclamation has with the New Mexico Department of Game and Fish or who would build them.

Q. That brings another point up. You have mentioned that any fishing lakes or any reservoirs in these dams, if any of them be built in the future, might be operated under some sort of contract arrangement of the State Game and Fish Department; is that correct?

A. Some agreement.

Q. In fact, you have a couple of lakes on forest land in the Gila National Forest under such agreement, don't you?

A. That is correct.

Q. You have Lake Roberts and you have Snow Lake, don't you?

A. That is correct.

[96] Q. Isn't it true that both of those operate entirely on water rights acquired and transferred under state law rather than under the doctrine?

A. I have no knowledge of how the New Mexico Game and Fish got the water rights.

Q. You know they did get water rights?

A. I understand they did.

Q. Water rights adjudicated in this District Court on State decree to private?

A. In the Gila River Drainage.

Q. That's right. As a matter of fact, the Forest Service even went to some lengths to obtain title to certain adjudicated water rights to private individuals in the Gila by Judge Norman Hodges for the purpose of partially filling Snow Lake, didn't they?

A. Those were cultivation special-use permits.

Q. They were adjudicated rights in the state court, weren't they, Mr. Ritchey?

A. Yes, they were.

Q. As a matter of fact, what hapened when Mr. McCalley sold them to the Pacific Western Company and Pacific Western tried to transfer them over to the Forest, and they said we will protest you and stop you unless you give us part of those water rights to fill Snow Lake?

A. I wasn't here then.

[97] Q. Yes, but you know what happened?

A. I know something like that went on.

Q. Those were all rights under state law and adjudicated in the state court, not the United States?

A. I have never traced the history.

Q. You know, don't you, that the United States was part of the Gila River adjudication, don't you?

A. I have studied it.

Q. I didn't ask you what you had studied. Do you know that as a fact, or don't you?

A. I can't answer it.

Q. All right. Now, you have told me that Snow Lake and Lake Roberts is two fishing lakes over in the same National Forest on the other side of the drainage of water stored under state water rights. Do you know of any lake on National Forest land, any fishing lakes on National Forest land anywhere in the State of New Mexico that has any water in them for fishing? Pools, any sort of pool for recreation or fishing, which are not based on state-acquired water rights?

A. I can not think of any in this state.

Q. All right.

A. Although there may be some.

Q. Then why would you assume that four reservoirs which you suggested the Bureau of Reclamation or somebody else [98] or the State Game and Fish Department might build and operate in the Mimbres Drainage would require water under the reservation doctrine, when the very similar fishing reservoirs you have on the Gila Forest and the other side of the drainage, you tell us you don't know of any fishing lakes in the state on any forest land that operates except under state water rights? Why do you make the contrary assumption as to these four possible future fishing pools on the Mimbres Drainage?

A. I made no assumptions. This I reported, data which I found in the files and from talking with individuals on the forest.

Q. Did I understand that these things you put in your inventory and your revised inventory are not based on reservation doctrine rights, but state-acquired water right?

A. I made no assumption either way.

Q. Either way, I see. So it is quite possible then that much or possibly all of what you listed as present and/or future uses in the Mimbres Drainage in the Gila National Forest might be now, and may be in the future, satisfied under state doctrine, under state water law, by acquisition and transfer of water rights?

A. I don't think I can know this.

Q. You don't know, but that could be the case?

[99] A. I can't answer that.

Q. All right. You know, of course, from the experience of Snow Lake and Lake Roberts, that's quite possible, obviously, to acquire and transfer water rights under state law in order to get such fishing reservoirs in national forests?

A. That is true.

Q. That's true? Now, this business that you went into in length with Mr. Redd about endangered Gila trout and wildlife watering and cattle watering in the stream and minimum flows for fishing, in-stream fishing flow, I would like to go into that a little bit. Possibly I missed something in the course of your answers, but it sounded to me like you were saying you were making estimates of consumptive uses of water for these purposes? Was that correct, in your inventory?

A. Which one of those are you talking about?

Q. Any of them, all of them.

A. Well, fishing in the stream, there has to be a minimum flow to support the fisheries.

Q. I asked you about consumptive uses of water. The fish are not, except metabolically perhaps, in minute quantity.

A. There is a consumptive use and that is the trees which shade the stream and which provide the cool—the lower [100] temperature which provides trout habitat.

Q. We're talking about, now, vegetation, watering of wildlife in the stream itself, without any man-made work and minimum flows necessary for the Gila trout and fishing the endangered Gila trout and other fish. Now, let me see if I understand what the nature of your inclusion of the inventory was. Are you saying that a certain amount of water has to be reserved against somebody else for minimum flow in the stream? Or are you just describing a natural situation, that if somebody takes the stream away, there is not water, the land and fish will die? Is that all you're saying?

A. As far as if the water is taken away, we have a tragedy, no fish, no trees, nothing.

Q. But in fact, you're upstream from everybody else on the Mimbres River, aren't you?

A. In this case, yes.

Q. So who is going to take it away from you?

A. Look at the map on the upper Mimbres. Two pieces of private land right there that could be developed, subdivided.

THE COURT: When you say "right there," place where you are pointing to.

THE WITNESS: Very close to the Cooney dam site, there are two parcels of private land there.

[101] BY MR. BLOOM:

Q. Do you know who owns them?

A. A Mr. David Gerrow owns all or part of them.

Q. Well, what you are saying then as to one particular man who has no existing uses, is that correct? He has no present uses in that area on that land?

A. Possibly he has his cattle there. He has his cabin there.

Q. He may have a small, domestic well?

A. Yes.

Q. He could have; you don't know that he has them?

A. No.

Q. All right. But except for this one man who could possibly develop more than, you know, he has now, you're upstream from everybody on the Mimbres River?

A. In this case, yes.



Q. All right. So what is the utility or purpose of including these minimum flows in the stream that you believe are required for Gila trout and watering deer and fishermen and riparian vegetation; except with this one man, you're upstream from everybody; aren't you really just saying that you would like this Court to arrange that there would always be enough winter snow and summer rain to keep your stream live? And do you really think the Court can do that?

[102] A. No, not at all.

THE COURT: Did you include in your inventory an amount of water used for items or—

THE WITNESS: Where consumptive use was involved, we did.

THE COURT: And where would this consumptive use be?

THE WITNESS: Well, permanent waters in the stream are very important watering for cattle, and the consumptive use here is tied in with the total cattle use and the grazing allotment, and this work that Mr. Martinez did.

THE COURT: The fact of the matter is, livestock used up in the upper regions, don't you have control of that? I mean, you're the one to determine whether you are going to let any livestock in there which are going to consume any of this water, which is going to lower this stream where you won't get the benefits of it? Or am I wrong?

THE WITNESS: It would take a lot of livestock to lower those streams that much. But the fact is that where those streams are, a great number of cattle normally don't go in there. However, when the stream is running in the lower region where there is greater grazing potential, they use those.

[103] THE COURT: The fact is, in answer to Mr. Bloom's question as far as the fishing and the fish promulgation—

THE WITNESS: Yes.

THE COURT: —and this kind of thing, there is no consumptive use of water to preserve the—

THE WITNESS: No consumptive use, other than recognizing the fact that the water has got to be there to have any fish.

THE COURT: So then you set that up as a use for yourself; is that what you have done in this inventory?

THE WITNESS: We did not list it as a consumptive use, but listed it as a need.

THE COURT: Of the amount of water that you estimate is in that stream, the full flow of the stream at that point?

THE WITNESS: Again, my estimate was an underestimate. We started off with two cubic feet per second on these streams, and realized that it should be more. It should be approximately what there is on the streams in the upper regions, because we could have the whole stream flow without damaging other people.

MR. BLOOM: Your Honor, the State would be glad [104] to stipulate. I don't see the utility of the Forest People solemnly putting in what seems to be prayers for water as to their inventory.

THE COURT: If I understand it correctly, and I'm not sure I do, what you are doing is questioning their competition, if you please. And I take it that this will—may point out something here. Of course, I didn't recognize that this will be subject to inquiry if we get to quantification.

MR. BLOOM: Yes, sir. Well, it doesn't seem to me that this is a quantifiable thing. There are certainly no man-made works.

THE COURT: I think you got the answer you were seeking.

MR. BLOOM: All right.

THE COURT: I think it would be necessary, in connection with the inventory, to be able to relate to one another.

MR. BLOOM: I didn't want this including the inventory. We think the principle of the inventory is fine, but we don't agree with the particulars.

THE COURT: I understand.

MR. BLOOM: I wanted the witness to see if he agreed, if they had a forest and a lot of [105] upstream,

and if they had a right for minimum upstream from the farmer and the city, it seems to me somewhat removed from my calculations of consumptive uses.

BY MR. BLOOM:

Q. You said something about the floodwaters on reaching Noonday Canyon that might be trapped by a possibility of some future construction of Noonday Lake by somebody. You said that the normal base flows, if I understand you, would not in the normal case reach the Mimbres River, but occasionally floodwaters do?

A. Yes, sir.

Q. You would agree, of course, wouldn't you, that when the base flows percolate underground, leaving aside flood flows, that those base flows going underground are, of course, hydrologically related to the Mimbres River?

A. No, I do not, because I don't know the hydrology of that site.

Q. The surface stream is a tributary to the Mimbres?

A. That's right.

Q. Do you have any reason to think that the ground water goes off in some peculiar direction and doesn't run—percolate parallel with the stream itself?

A. I have never seen a ground water hydrology report of that area.

[106] Q. Okay. So you know no reason why they should not in fact do what water ordinarily would do? When there is a dry stretch, they percolate underground and come up later, or merge downstream with the—in water table conditions or on the surface in the main stream?

A. No, I would not say that, because there are many things in the geology that can fool a person. Many times the ground water divide and the surface water divide is different.

Q. Do you know anything here, any geological formation, that would in fact separate ground waters in the immediate underflow of the Noonday Canyon, Noonday Creek, from the ground—from the water tributary to the Mimbres River system?

A. I have never studied the area.

Q. So you don't know of anything that would separate them?

A. No, that is true.

Q. You don't know?

A. I can't answer either way, because I have not studied this.

Q. All right. Who told you to revise your inventory?

A. I did.

Q. You did it completely on your own initiative?

A. Certainly.

Q. Did you ever talk to any attorney for the United States [107] of America before you did that, in relation to this case?

A. No. I believe Don was unaware that we were doing this.

Q. In fact, you have a copy of your revised inventory with you?

A. Yes, I do.

Q. I think you said you didn't assign any consumptive use valid to these three reservoirs, either in your revised or first inventory, in addition to Noonday?

A. That's right, I did not.

Q. How long had the lands in the Mimbres Watershed been in the Gila Forest?

A. The reservation date on part of it is 1899.

Q. So we have something like sixty or seventy years of history of administration by the Forest Service of all the forest land in the Mimbres Drainage?

A. That's correct.

Q. Is it your view that the records of the Forest Service accurately show in general the water uses that had been made during that period of time in the Mimbres Drainage on the forest?

A. No.

Q. Do you think any large water uses have been omitted?

A. I do not know.

Q. You think some people slipped up there and put in large [108] reservoirs that you did not know about, or your predecessors didn't know about?

A. I don't know of any.



Q. As a matter of fact, you know, don't you, that the only uses that had been made in the last seventy years in the Mimbres Drainage in the forest have been preponderantly for stock water uses, as your first inventory shows; isn't that correct?

A. Preponderantly, but some of these ponds emanate from possibly mining operations and were used by grazing permittees.

Q. As a matter of fact, as we computed, about 72.25 acre feet a year out of 84 or 85, which your first inventory shows as total of present consumption uses in the Mimbres Drainage is in fact accounted for by stock watering use on your first inventory?

A. This is possibly true.

Q. Yes. Don't you think that that seventy years of records in which seven-eighths was made by permittees for stock watering purposes gives you a pretty good historical picture of water use in the Mimbres Drainage in the Gila National Forest?

A. No.

Q. Why not?

A. The records are sparse, not really good. As a matter [109] of fact, a great number of cattle grazed that area much more than right now. At the time the forest was proclaimed, there probably could have been more use at the time the forest was proclaimed. We have added stock water ponds and there is evaporation loss. In our records, we found that possibly we had records of ninety percent of the stock water ponds, and the other ten percent came when I interviewed people. And actually, this survey helped our other records, to get those up to date.

Q. But you didn't make or cause to be made a survey of water use? And interview the people who use the, for example, total of 84 acre feet annual consumptive use for all purposes at the time of your inventory, first inventory?

A. That is true, yes.

Q. And you did in fact make a comprehensive check of your matter and investigation of—

A. It was the best job I could do.

Q. At that time?

A. At that time.

Q. All right. Do you have any reason today to think that you omitted any significant historical use, any use that existed at the time that you made that first inventory for the Mimbres Drainage?

A. Yes, I do.

[110] Q. What did you omit?

A. Wildlife waters.

Q. I'm talking about consumptive uses of water, Mr. Ritchey. Now, what man-made works for consumptive use exists in the Mimbres Drainage for the purpose of watering wildlife?

A. A great number of them.

Q. Who has built stock ponds for watering wildlife in your forests?

A. The Forest Service.

Q. Aren't they included in your inventory?

A. They were included in the original inventory, and we found additional ones.

Q. How many did you find?

A. There was one that I know of.

Q. Well, how big was it?

A. About a tenth of an acre foot.

Q. Out of all these hundreds of items, you found only one omission, and it was a tenth of one acre foot?

A. This is more recently. The first revision I made, I had almost—I don't know the exact count. There was almost between fifty and seventy separate revisions.

Q. You counted the revisions every time you had to revise something or make any kind of change at all, or what do you call a revision? Do you have to run it through a [111] computer every time for it to be a revision?

A. That's right.

Q. You must be doing one of these every two weeks.

A. I have a number now that I need to put in. I just thought of these the last few days and came across the record the last few days.

Q. You use the term "indirect short-range foreseeable" and "Long-range foreseeable." What do you mean by those terms? Are they your terms or somebody else's?

A. They're my terms and solely mine. I had the responsibility for that. This pertains to the grazing allotment, possibly should have done this on recreation, but our data is so sparse right now that if a range is improved such as it is, it could have additional cattle on it.

Q. You mean if it's irrigated or what?

A. No, if the waterings are put in and this sort of thing.

Q. What you are saying is that if you manage your grazing land differently than you do, then you will have a different number of cattle?

A. If we could encourage the permittee to do a good job.

Q. Is that one of the criteria of your Forest Administration, is to encourage the permittee to get more and more cattle grazing in the forest?

A. No. We want to encourage the permittees to do the [112] proper job. It's to his benefit and to ours.

Q. I'm a little surprised. Up north in New Mexico, we hear that the Forest Service has been criticized for cutting back the number of cattle. I'm a little surprised to hear that you're encouraging the contrary.

A. Each piece of land has a potential for improving, and if that land improves to where it will support additional cattle, we have really no choice but to put additional on. If it can be done without a retarding of this improved range.

Q. That's what you mean by long-range foreseeable?

A. That's short-range. If an allotment—if we could ever get the money ideally to water an allotment, that's where we go in the long-range. These terms are original.

Q. What's the difference between the improved condition and the ideal or perfect condition?

A. Actual range condition of the allotment is all.

Q. What would be involved in reaching the ideal range condition?

A. I don't know what you mean by "ideal range condition." That's what I am talking about, is that a range has potential for improvement, and if permittees achieve this potential. Now, in the long range for good cattle

distribution over an allotment, we would need an ideal setup of watering. That would only come in the long [113] range, because our funding has been so sparse.

Q. I see. So your short range is improvement made by the permittee. Your long range is being followed up by further improvements made by you if you get the money?

A. That's the way I can see from the purpose of this inventory.

Q. That's a conjecture following a supposition, but if they do, the permittees do the maximum they can, then if you get the money, then those things, those two things could lead to increased water uses for stock watering?

A. They could go hand in hand. And possibly those figures should be combined.

Q. That's in effect the utopian condition, that the permittee will do everything he should do, and the Congress could do everything they should do, and you would be able to use more water?

A. It isn't as grandiose as it sounds. It's really practical to do the job we should be doing.

Q. All right. I think you told Mr. Redd, Mr. Ritchey, that you didn't mean this inventory to be a firm estimate. You meant it to be your best guess, is that a proper—is that a proper paraphrase of what you said?

A. That's right.

Q. What's the difference in your mind between the best guess you can make right now and the best estimate you [114] could make right now?

A. One and the same.

Q. That's right. If they're one and the same, what do you mean by the distinction then, I take it, is that if your Forest is to put down your water requirements, including your foreseeable right now, then what you did in your inventory as you revised it is a continuing statement of your best estimate. But if we give you more time and don't put a limit on it, you will come up with other things as time moves on? Is that a fair paraphrase?

A. I don't think so.



Q. Well, will you tell me what the difference is then between the best guess you could make now and the best estimate? You have told me the terms mean the same thing.

A. A guess-timate and an estimate are certainly the same. This estimate is an educated guess; it certainly is that. But we learn things with time, and we get better data with time.

Q. If some court of competent jurisdiction were to lean over and tell you, Mr. R. chey, "You have half an hour to give me your best estimate on your oath of your water requirements, present and future foreseeable, future and existing, for the Mimbres Watershed in the Gila Drainage," you would have to give them your most [115] updated inventory, wouldn't you? Isn't that the best that you have right now to document the total of your existing and your reasonably foreseeable requirements?

A. Our latest revision is our best estimate now.

Q. Right. And a year ago, whatever inventory you had at that stage was your best estimate?

A. That is correct.

Q. All right. Are you aware whether the—let me ask you this. What studies have you made to determine whether the Mimbres River contains any unappropriated waters at the present time?

A. We're not in that stage of this inventory. We're in the preliminary stage.

Q. You have made an inventory that was sent to Mr. Redd and Mr. Bloom, but you have not finished the inventory, is that correct?

A. Eventually there would be notification to the states and maybe this would all be in balance, I rather presume.

Q. But you have made no present study as to availability of unappropriated waters in the Mimbres?

A. No.

Q. Do I infer correctly that you have made no attempt to calculate the effect of increasing depletions of the National Forest through the construction of the reservoirs you have talked about, or through increased [116] depletions through stock watering or increases in stream

uses, or any of these other things on the existing water use, economy downstream from you on the Mimbres River System?

A. I have made no study.

Q. Do you intend to make one?

A. I do not know.

Q. I call your attention to 2541.03—policy, which has already been introduced into evidence from the Watershed Manual of the Forest Service, quote: "Water required for National Forest System purposes will be used efficiently; in water scarce areas, it will be used frugally. Forest Service responsibility for meeting the resource needs of the people, including water, dictates a policy of caution and reasonableness in our deliberate use of water, to improve the use and productivity of the National Forest System. Determining such water needs in areas of short supply, careful consideration will be given to the needs of non-National Forest users who are dependent on water for their livelihood." You're telling me that, notwithstanding this policy statement in your manual, that you made something like sixty revisions of inventory, but have not yet given a thought to the effect of these proposed uses on the short supply? That's already affecting the people in [117] the Mimbres System.

A. That's not the purpose of reporting in this inventory at this time.

Q. You recognize that this is a post directive from the Forest Service, generally governing your water uses in the forest, don't you?

A. I have read that, yes.

Q. You're aware, therefore, that you would have to comply with this under the requirements of your employment in formulating final plans for this, or the Forest Supervisor would, in determining what could be used and what could not?

A. We most certainly would, and to my knowledge, we have never, ever entered with a person's water rights in this manner.

Q. Therefore, if I understand these inventories, in addition to being preliminary, in your view, and your best estimate, they are not based, as you told me earlier, on any assumptions that this water will be available to

you only through exercise of reservation right; but in fact, they are neutral and could be—just as well be satisfied like these reservoirs through acquisition and transfer of state water rights, state recognized water rights, like Roberts Lake? And further, that any uses made by the forest, as contemplated in these inventories [118] preliminary inventories, with this provision of your manual, which will require that you give very serious care to the downstream people before you use water; isn't that true?

A. That's quite a bit to swallow.

Q. You agree that before you finalize your inventory, it will have to be scaled down to allow for the policy directives which I have read to you from the manual, which requires if you take great care not to infringe on the uses of other people outside and downstream from the forest, whether those are senior or junior to the National Forest in legal terms?

A. This may be, but again, I'm only in the reporting stage right now.

Q. Right. So what you are saying, you're in the stage in which you survey all possibilities, no matter how remote, put everything in at this stage and then scale it down later to reflect necessary policy directives and availability and state of water rate under state law and other factors?

A. Well, I don't know how we're going to work this in the future, but these are in the inventory because they're on the record.

Q. Then, if I understand the inventory, it's really a preliminary estimate of the maximum that could be claimed [119] by the Forest Service, since it stands to be reduced by these other factors we talked about, like reservation water rights? Since some of these are bound to be supplied by state-acquired rights, some of them don't involve—

MR. GRANT: I object on the grounds that question has been asked and answered.

THE COURT: I am inclined to sustain it.

BY MR. BLOOM:

Q. All right. You state that Noonday Lake has been under study for forty years?

A. It has been proposed possibly for all that time, but I'm quite certain that it would have been built by now had the three C's continued to operate.

THE COURT: I'm a little bit intrigued, Mr. Ritchey, with a discussion that these various proposals of reservoirs, which are, as I understand it, now probably in the hand of the Reclamation Service, if built, would utilize Forest Service water and would be beneficial to the operation of the forest. I don't understand that that would be the basis upon which the Reclamation Service would build them. Am I correct in that?

THE WITNESS: The Bureau's outlook and functions have changed in the last few years.

[120] THE COURT: I was told that a few minutes ago, but you still say that the Reclamation Bureau would consider building this because it would benefit the forest?

THE WITNESS: No, I don't know who would build them, but the Reclamation Bureau is planning, and they have got into it because of the overall Mimbres Project.

THE COURT: All right. Do they have a broader interest in the Mimbres?

THE WITNESS: Yes. A larger Mimbres dam than has been proposed.

THE COURT: That's not on the forms?

THE WITNESS: Yes, it is.

THE COURT: Oh, it is?

THE WITNESS: Yes.

MR. BLOOM: They haven't claimed that one, Your Honor; that's the only difference.

THE WITNESS: I believe that was Number E on the map.

THE COURT: Do I understand that E is the lower Mimbres site, you called it? That's the way I wrote it down anyhow.

THE WITNESS: Yes, it located on the Mimbres River at MacKnight Canyon.



[121] THE COURT: And that is the site that is being studied by the Reclamation Bureau? But did not involve any Forest Service water?

THE WITNESS: That is true. It is not a Forest Service proposal. There was nothing on record until it was proposed.

THE COURT: How does it differ from these others, as far as Forest Service water?

THE WITNESS: These were old proposals on record.

THE COURT: But not the Forest Service?

THE WITNESS: Yes, Forest Service. The three C's operated under the Forest Service, and these proposals came from this. The three C's throughout the country built fishing lakes and built the recreation facilities around them.

THE COURT: And if I understand you correctly, the Reclamation Service interest in the lower Mimbres site is for additional purposes, I assume?

THE WITNESS: It was a multi-purpose dam.

THE COURT: What would be the additional purposes?

THE WITNESS: Fishing, boating, and allied water sports, this sort of thing. I doubt if the feasibility of it was thought of then.

THE COURT: And you say that because of their interest in that, they are studying these others, [122] which would have a benefit through the Forest Service?

THE WITNESS: Well, it's not as a benefit to the Forest Service as much as it is for the recreation and opportunities for the community.

THE COURT: I couldn't rephrase the ultimate question that you were asked by Mr. Redd as to whether or not, in your opinion, how the construction of these reservoirs would carry out purposes of the withdrawn water from the Forest Service, and I believe your answer was yes?

THE WITNESS: Yes, that's correct.

THE COURT: Is there any difference between that and the site upon the Site E?

THE WITNESS: They all would.

THE COURT: But you don't include that one?

THE WITNESS: No, because there was nothing on record that I could tie to that that had ever been in the Forest Service proposal.

THE COURT: Now, we're talking about future needs. This is what these items are, and do I understand you to say that the only future needs now that you have considered are the needs which have been talked about some time in the past?

THE WITNESS: Yes, that's the only one I considered [123] in this one.

THE COURT: Don't you think there might be some that nobody has ever thought of yet?

THE WITNESS: A great deal, a great deal.

THE COURT: Including Site E?

THE WITNESS: That's right.

THE COURT: But you didn't put in any Forest Service reserved water for Site E?

THE WITNESS: No.

THE COURT: And didn't contemplate that you would?

THE WITNESS: I hadn't thought of it in quite that way. I thought of things that were strictly tied to Forest Service proposals, Forest Service operations, and the broadening of Forest Service recreational opportunities towards the community.

THE COURT: Go ahead, Mr. Bloom.

BY MR. BLOOM:

Q. If you needed them for the forest, you needed them forty years ago, why haven't they been built?

A. Money.

Q. Has the forest—

A. We hardly have enough money to pick up the beer cans.

Q. What studies have you had made of the feasibility of these?

A. The Forest Service has made no study, unless the CCC did [124] it, and the record is lost.

Q. In other words, there are things that you think are needful, but you never got around to study whether or not they were feasible?

A. That is correct; however, the New Mexico Game and Fish did.

Q. They operate under state law?

A. Right.

MR. BLOOM: That's all.

THE COURT: Mr. Redd?

MR. REDD: No further questions.

THE COURT: That's all. Do you have anything further?

MR. REDD: No further witnesses, Your Honor.

(WHEREUPON, this Hearing was concluded.)

[UNITED STATES EXHIBIT 4]

July 21, 1972

AIR MAIL

Paul R. Bloom, Esquire  
Special Assistant Attorney General  
State of New Mexico  
Bataan Memorial Building  
Santa Fe, New Mexico 87501

Dear Mr. Bloom:

Re: Mimbres Valley Irrigation Co. v. Tony Salopeck,  
et al., Civil No. 6326, Six Judicial District Court,  
County of Luna, State of New Mexico

Some time ago you requested documentary evidence of the various reservation and withdrawal orders placing lands in the Rio Mimbres Watershed in the National Forest as alleged in our answer in the above-captioned action. Enclosed are copies of the Presidential Proclamation dated March 2, 1899, General Field Order No. 6, Headquarters, District of the Missouri, dated July 26, 1866, ordering the establishment of Ft. Bayard, Executive Order dated April 19, 1869, confirming the establishment of Ft. Bayard (together with supporting documents), Executive Order dated July 14, 1906, Executive Order dated May 23, 1907, Executive Order dated July 23, 1908, Executive Order dated November 13, 1908, Executive Order dated June 22, 1910, Executive Order dated October 22, 1910, Executive Order dated April 24, 1911, a letter dated January 2, 1941, from the Commissioner of Public Buildings transferring the major portion of Ft. Bayard Military Reservation to the Department of Agriculture and a copy of the deed dated July 1, 1966, conveying the hospital site at Ft. Bayard to the State of New Mexico.

The following Proclamations and Executive Orders withdrawing lands from the public domain for forest purposes within the Rio Mimbres Watershed are not included because they are printed in the Statutes at Large



and readily available. The Presidential Proclamation dated July 21, 1905, may be found at 34 Stat. 3123. The Presidential Proclamation dated February 6, 1907, may be found at 34 Stat. 3274. The Presidential Proclamation dated June 18, 1908 may be found at 35 Stat. 2190. The Presidential Proclamation dated May 9, 1910 may be found at 36 Stat. 2694.

Also enclosed are copies of computer printouts showing water uses and projected water uses for the Forest Service and of other Government uses from the National Forest in the Ft. Bayard Reservation. The projected water use figure is the current estimate used by the Forest Service and is subject to revision. It is not intended to be construed as Claim of the United States total future uses under its reserved water right in this Watershed.

Sincerely,

Assistant Attorney General  
Land and Natural Resources Division

By: Donald W. Redd  
Attorney

#### Enclosures

CC: Irwin S. Moise, Esquire  
Sutin, Thayer and Browne  
800 Simms Building  
Post Office Box 1945  
Albuquerque, New Mexico 87103

[UNNUMBERED UNITED STATES EXHIBIT]  
[*supra*, pp. 63-64]

#### EXTRACTS FROM FOREST SERVICE MANUAL AS REVISED THROUGH OCTOBER 1965, AMENDMENT NO. 137

#### TITLE 2500—WATERSHED MANAGEMENT

-d. Employ the proper engineering design to make certain that water-use facilities are safe and efficient.

4. *District Rangers.* The District Ranger may be authorized to:

a. Provide for efficient and economical use of water on National Forest System lands in accordance with Forest Service policies and, where applicable, in accordance with State laws.

b. Inform the Forest Supervisor of National Forest System water-use requirements as needs develop or become apparent.

2541.1—*Withdrawal of Lands and Reservation-of-Water Principle.* The reservation of water is effective as of the date of the withdrawal of lands from the public domain. For the various withdrawn lands these are:

1. *National Forest Lands Withdrawn From Public Domain.* The date of the Presidential proclamation establishing a forest reserve or National Forest.

2. *National Grasslands and Land Utilization Projects.* (For former public domain lands only.) The date the lands were withdrawn from the public domain for the purpose of the Land Utilization Project.

3. *Taylor Grazing Lands Added to National Forest (Act of July 9, 1962).* The date of withdrawal of the lands from the public domain for National Forest System purposes.

4. *Former Indian Reservation Lands.* The rights and effective date are dependent on what the United States

actually acquired in each case. Advice from the attorney-in-charge or regional attorney of the Office of the General Counsel should be obtained in each case.

Within the National Forest System where the reservation principle applies, water rights that have been acquired under the procedures prescribed by State law prior to the establishment of the reservation are good as against the United States, and are compensable if taken by the United States. Under such conditions, reservation of water for National Forest System purposes is subordinate to water rights established prior to the date of withdrawal. It is essential that locations of diversions and amounts and dates of appropriations for such other rights be known by forest officers before States are notified of National Forest needs. In some instances waters may have been fully appropriated before the date of withdrawal. In such cases National Forest System needs may be met through the purchase of water rights or by application of measures which will increase the usable supply of water.

Water rights in some areas have been perfected or may in the future be perfected by Federal court decree, and in a few instances they may be affected by inter-State compact or treaty. Perfected rights must be considered valid unless reversed or invalidated by a court of competent jurisdiction. Such valid water rights must be taken into account when use of water under the reservation principle is contemplated.

In some instances, States have recognized beneficial-use dates in the name of the United States for National Forest System water use that are prior to the date of withdrawal. An example would be where the State has issued a water right to the United States in recognition of the fact that the water had been put to beneficial use by stockmen for stock watering before the withdrawal of the lands for National Forest purposes. In such cases where water rights can be obtained under State law that are paramount to those secured under the reservation principle, the water rights should be perfected under State law.

*2541.11—Notification to States of Water Uses.* For a considerable time it was the policy of the Forest Service to make filings with appropriate State agencies in accordance with procedures established by State laws for waters needed in connection with the development and administration of the National Forest System. In this way the Forest Service endeavored to inform State officials and others as to National Forest System water requirements. Although formal filings will no longer be made for waters available under the reservation principle, the Forest Service will continue to inform the States of its existing and foreseeable water uses. This will be done for both surface and subsurface waters. Filings previously made in accordance with procedures of State law and water rights subsequently issued should be preserved for record purposes.

Information will be provided in the form of a periodic notification, preferably by watersheds, which will list all National Forest and National Grassland water uses, existing and foreseeable. Where practicable, watershed areas so reported will coincide with State water districts or State subdivisions for water-right administration. Full consideration should be given to State problems that may result in connection with procedural changes.

*2541.12—Reportable and Nonreportable Uses.* For report purposes, distinction must be made between nonreportable water use which is utilized naturally as contracted to reportable water use which is artificially or deliberately utilized to improve the use and productivity of the National Forest System.

Examples of nonreportable uses include, but are not limited to:

1. Evaporation from any water body or stream.
2. Seepage losses from any water body or stream.
3. Consumptive use of water falling on the land and utilized onsite for trees, grass, or shrub growth.
4. Consumption created by the water-retarding effect of road construction, erosion control, or other activities.



Examples of reportable uses and needs include, but are not limited to:

1. Developments to improve the availability of water for wildlife or domestic livestock.
2. Diversions for irrigation of pastures, nurseries, or meadows.
3. Administrative-site water supplies.
4. Developed water for recreation area uses.
5. Developed water for logging camps.
6. Water required for developed special uses, such as resorts, summer homes, and cow camps.
7. Initial filling of conservation pools designed for permanent recreation, fish, or wildlife use in public or privately financed water storage reservoirs.
8. Initial filling of impoundments developed specifically for recreation, fish, and wildlife habitat.
9. Flows necessary for fish habitat protection, such as minimum streamflow or lake-level requirements to maintain fish life, including fish ladders and regulated-flow spawning channels, when diversions are anticipated which would result in less than minimum acceptable flows.
10. Minimum flows required for maintenance of streamflows and lake levels for recreation, scenic, or esthetic purposes, when diversions are proposed which would result in less than minimum acceptable flows or levels.

*2541.13—Reporting Water Reserved From Development.* Careful attention will be given to determining water requirements and future water requirements for management of National Forest System lands when conducting multiple use surveys and preparing reports on water resource development projects. Following completion and approval of multiple use survey reports, notification will be made to the State as to the water reserved for National Forest purposes which would not be available for issuance of State water rights to the water development agency.

*2541.14—Analysis of Water Needs.* Decisions to initiate or expand reportable water use for National Forest Sys-

tem purposes will be based on thorough analysis by the Forest Service of the various factors involved. Developments will be designed and operated in a manner which permits the most efficient use of water. Provision for maximum return flows should be considered. Other water saving methods, such as the use of monomolecular films to retard evaporation from water surfaces, must also be considered.

In drainages where water has been completely appropriated under State law subsequent to the reservation date, use of water for National Forest System purposes will be expanded only where careful evaluation of all water uses and needs fully justifies such expansion. Where non-National Forest use of water has been established under State law, the values and benefits of proposed National Forest System uses and activities dependent upon that particular water supply will be fully analyzed before a decision is made to increase National Forest System water use. The effect of the proposed National Forest System water use on present non-National Forest users who are dependent upon water for their livelihood will be fully considered to ensure that any unnecessary disruption of their existing water use is avoided.

In such cases a written analysis of the problems and relative needs involved, with recommendations, will be made by the Forest Supervisor. The analysis will be reviewed and approved by the Regional Forester before the water is used for National Forest System purposes and the State notified (FSM 2541.04).

*2541.15—Form of Notification.* No standard form is required for notification to States of water use. Procedures for notification will be worked out by the Regions on a State-by-State basis. The State water agency should be requested to participate in the development of such procedures. Where more than one Region deals with a single State, the Regional Foresters concerned will jointly develop the notification procedures with the State. A listing of existing and foreseeable National Forest System water uses and needs by watersheds, with an annual updating,

is preferred because of its simplicity. Attempt should be made to get State acceptance of this notification.

*2541.02—Objective.* The objective of the Forest Service is to obtain sufficient quantity of water, in accordance with legal authority, to provide for the development, use, and management of National Forest System resources with due consideration for the needs of other water users.

*2541.03—Policy.* Water necessary for the development, use, and management of resources of the National Forest System will be used in accordance with the reservation principle where applicable. In cases where that principle is applicable, the proper State water agency will be notified of current and foreseeable future National Forest System water requirements in a manner to be developed with each State, on a State by State basis. Where the principle is not applicable, water rights will be obtained in accordance with State laws. Water rights should be purchased if essential to Forest Service activities and not otherwise available.

The Forest Service, in all matters related to water use and water rights, will endeavor to work cooperatively with the States. Such cooperation will recognize the State's authority and responsibilities for allocation of waters within the State and the need for the State to be informed as to uses of water on the National Forests.

Water required for National Forest System purposes will be used efficiently; in water-scarce areas, it will be used frugally. Forest Service responsibility for meeting the resource needs of the people, including water, dictates a policy of caution and reasonableness in our deliberate use of water to improve the use and productivity of the National Forest System. In determining such water needs in areas of short supply, careful consideration will be given to the needs of non-National Forest users who are dependent on water for their livelihood. This will require a Forest Service analysis of the importance of water for National Forest System and non-National Forest System purposes.

#### *2541.04—Responsibility*

##### *1. Chief.* The Chief shall:

a. Develop policies, programs, and procedures for obtaining sufficient water for the development, use and management of National Forest System resources.

b. Develop and maintain cooperative relationships with national agencies and organizations concerned with development and utilization of waters on and from National Forest System lands.

c. Review and approve Forest Service participation in water rights adjudication proceedings (FSM 2541.7).

##### *2. Regional Foresters.* The Regional Forester shall:

a. Notify the States of the National Forest System water use, existing and foreseeable, as applicable under the reservation principle (FSM 2541.1).

b. File application for water rights in accordance with State law, for water required for use on the National Forest System lands not reserved from the public domain (FSM 2541.2).

c. Purchase water rights as may be necessary.

d. Review and approve water needs analyses submitted by the Forest Supervisor in support of water use notifications where water is fully appropriated (FSM 2541.13).

e. Provide technical guidance, assistance, and training, including engineering design of water use facilities, as required to meet program objectives.

f. Develop and maintain cooperative relationships with State and regional agencies and organizations and regional offices of national agencies and organizations concerned with development and utilization of waters on and from National Forest System lands.



g. Establish the rate of progress and priorities by watersheds to complete the initial inventories and records called for in FSM 2541.3, .31, .32, and .33 by not later than June 30, 1970.

3. *Forest Supervisors.* The Forest Supervisor may be authorized to:

a. Prepare and recommend to the Regional Forester a timetable of planned progress and priorities by watersheds for completing the initial inventories and records called for in FSM 2541.3-.33. The rate of progress and priorities should be such as to complete the job in advance of anticipated adjudication proceeding which may be initiated by States or other agencies.

b. Develop and maintain an inventory of National Forest System water uses (FSM 2541.3).

c. Prepare water-use notifications (FSM 2541.1), water-right applications (FSM 2541.2), analyses of water needs (FSM 2541.13).

LAW OFFICES OF  
SUTIN, THAYER & BROWNE  
A PROFESSIONAL CORPORATION

800 Simms Building  
Post Office Box 1945  
Albuquerque, New Mexico 87103  
505-842-8200

September 17, 1974

Mr. Donald W. Redd  
Assistant Attorney General  
Land and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20530

Mr. Richard A. Simms  
Special Assistant Attorney  
General  
State Engineer Office  
Bataan Memorial Building  
Santa Fe, New Mexico 87501

RE: Mimbres Valley Irrigation Co. v. Salopek, et  
al., Luna County Cause No. 6326

Gentlemen:

After many delays and false starts I have finally put together what I believe may serve as a framework for the Findings of Fact and Conclusions of Law to be filed in this case. I enclose them herewith.

I would point out that I have had some difficulty in reconciling descriptions of properties as well as descriptions of present uses of water.

Utilizing the Findings and Conclusions as prepared by Mr. Simms and sent me in his letter of May 1, I find that in his paragraphs 1 a to e there are a number of omissions from the lands described in the computer print out which was introduced in the case. Also, there are a

couple of deviations from the other proposed Findings submitted to me. These differences should be reconciled and agreed upon, if possible.

I have left blank the uses specified in Mr. Simms' request in paragraph No. 2, inasmuch as they likewise differ from those contained in the proposed Findings submitted in paragraph VIII submitted to me in the case. These uses should likewise be reconciled and agreed upon, and incorporated into the Findings. In the proposed Conclusion No. 8 submitted by Mr. Simms the date "1896" appears. I have incorporated this Conclusion as my Conclusion No. 7, but show the date as "1869." I believe the 1896 date is an error.

You will note that I have incorporated as Conclusion No. 9 the requested Conclusion No. 10 submitted by Mr. Simms on the assumption that it conforms to the understanding of the parties. I have no independent recollection of the matter.

As you will observe from my draft, I have concluded that I should adhere to my conclusion as to the law, as submitted in my letter dated January 17.

I would appreciate it if you would undertake to agree upon the descriptions and uses mentioned above and that they be inserted in the proper places and the instrument completed accordingly and returned to me for my signature and filing. If you have any additional questions, feel free to communicate them to me.

Very truly yours,

SUTIN, THAYER & BROWNE  
A Professional Corporation

By /s/ Irwin S. Moise  
IRWIN S. MOISE

[SEAL]

STATE OF NEW MEXICO  
STATE ENGINEER OFFICE  
Santa Fe

November 22, 1974

Hon. Irwin S. Moise  
Sutin, Thayer & Browne  
P.O. Box 1945  
Albuquerque, New Mexico 87103

Re: Mimbres Valley Irrigation Co. v. Salopek et al.,  
Luna County Cause No. 6326.

Dear Justice Moise:

A week ago Tuesday I met with representatives of the United States in an attempt to resolve the numerous differences in property and water use descriptions in the proposed Findings of Fact. I enclose herewith the result of that meeting—subject to final review by the United States, proposed Findings that the State of New Mexico and the United States have agreed upon in all particulars except one.

The only remaining area of dispute involves a mixed issue of law and fact which probably should have been but was not argued in Deming, namely whether the claim of a minimum flow at certain points in a river can be asserted as a federally reserved water right. The problem was not argued earlier because I was unaware that the claim was being made. I was remiss, I believe, in not noting that the claim was being asserted in the government computer printout, but the printout was not abstracted by either party until after the arguments.

When the technical abstracting was done with respect to the property descriptions and water uses, it was done in this office by the engineering staff. The result was that a minimum flow of 2 c.f.s. appears in the State's initial proposed Findings (at p. 4). In my brief review of their findings as to use and location I did not catch



the minimum flow, and consequently the proposed Findings and Conclusions left the office containing an item that should have been deleted. In any event, at our Tuesday meeting the United States had another, more recent computer printout which, it was said, more accurately described the facts as of the date of trial. However, the new printout included two more claims at different locations of 2 c.f.s. minimum flows, thus totaling 6 c.f.s. and bringing the matter to everyone's attention.

As a result the only remaining difference between the parties stems from the minimum flow claims. The enclosed Findings and Conclusions do not recite the claims as would, I'm sure, the United States' proposal. In all other respects we are in agreement. As to the remaining difference of opinion I respectfully request that the parties be permitted to argue the question by memorandum brief.

One other matter should be mentioned. The recent printout also made reference to item number 879, designated as the airport well and amounting to 2.01 acre-feet. This item is also left out of the Findings because it is not a reserved right, but rather a right appurtenant to acquired lands.

Sincerely,

RICHARD A. SIMMS  
Special Assistant Attorney General

[Submitted to Special Master Nov. 22, 1974]

## STATE'S FIRST PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on October 9, 1973, and the Special Master having heard the evidence and argument of the parties, finds the facts and states the conclusions of law as follows:

### FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:
  - a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: land located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all Sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.
  - b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28,

29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Sections 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.

- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.
- d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13 and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29 and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.

- e. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W., N.M.P.M.

2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
— 16S 10W	200		2.21	Stockwater	7-21-1905
— 16S 9W	206		.51	Stockwater	7-21-1905
4 16S 9W	207		.01	Domestic Residential	7-21-1905
— 16S 9W	225		2.99	Stockwater	7-21-1905
16 19S 9W	226		.03	Domestic Residential	7-21-1905
18 16S 9W	229		.03	Domestic Residential	7-21-1905
18 16S 9W	230		.03	Domestic Residential	7-21-1905
19 16S 9W	231		.01	Domestic Residential	7-21-1905
— 16S 10W	249		1.00	Stockwater	6-18-1908
— 17S 9W	264		3.52	Stockwater	7-21-1905
— 17S 9W	281		3.16	Stockwater	7-21-1905
— 18S 9W	307		3.18	Stockwater	5-9-1910
— 14S 10W	500		6.46	Stockwater	3-2-1899
27 14S 11W	511	2.00		Fish	3-2-1899
28 14S 11W	523		2.50	Stockwater	3-2-1899
35 14S 10N	536		.02	Domestic Residential	3-2-1899
35 14S 10W	536		.02	Stockwater	3-2-1899
— 15S 10W	537		2.13	Stockwater	3-2-1899



Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
— 15S 11W	544		6.97	Stockwater	3-2-1899
— — —	588		8.70	Stockwater	3-2-1899
— 16S 10W	587		12.65	Stockwater	3-2-1899
31 15S 11W	614		3.00	Domestic Recreational	3-2-1899
7 16S 11W	639		6.82	Domestic Recreational	5-9-1910
— 16S 12W	668		1.89	Stockwater	7-21-1905
— 16S 11W	674		2.94	Stockwater	7-21-1905
— 17S 12W	689		1.09	Stockwater	7-21-1905
— 17S 12W	698		4.90	Stockwater	7-21-1905
— 16S 12W	726		.63	Stockwater	7-21-1905
— 16S 13W	800		.51	Stockwater	7-21-1905
— 17S 13W	804		2.64	Stockwater	3-2-1899
17 17S 14W	904		.10	Wildlife	6-18-1908
— 20S 15W	907		1.65	Stockwater	2-6-1907

3. That the United States owns lands as follows which were reserved for military use as the Ft. Bayard Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to a point thirteen chains south of the north line of the southwest 1-4 of Section 10; thence east to the west line or northeast 1-4 of southwest 1-4 of Section 10; thence south to the southwest corner of same; thence east along the south line of same and along south line of northwest 1-4 of southeast 1-4 of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast 1-4 of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and

12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.

4. That on January 2, 1941, all of the lands of the Ft. Bayard Military Reservation except the SE $\frac{1}{4}$  of Section 25, the SE $\frac{1}{4}$  of Section 26, the NE $\frac{1}{4}$  of Section 35, and the NW $\frac{1}{4}$  of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U.S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.
5. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW $\frac{1}{4}$  of Section 25, the SE $\frac{1}{4}$  of Section 26, the NE $\frac{1}{4}$  of Section 35, and the NW $\frac{1}{4}$  of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.
6. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of Agriculture:

All that part of the SW $\frac{1}{4}$ , Section 25; SE $\frac{1}{4}$ , Section 26; NE $\frac{1}{4}$ , Section 35; and NW $\frac{1}{4}$ ; Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE $\frac{1}{4}$ , said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29°43'E., 37.30 ft. to Cor. No. 1-B; thence N.60°17'E., 21.25 ft. to Cor. No. 1-C; thence N.29°43'W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW $\frac{1}{4}$ , said Section 25; thence S.18°30'E., 2380.00 ft. to Cor. No. 3; thence S.47°59'W., 1573.40 ft. to Cor. No. 4; thence S.23°00'W.,

1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW $\frac{1}{4}$ , said Section 36; thence S.89°03'W., 2504.57 ft. to Cor. No. 8 on the South line of the NE $\frac{1}{4}$ , said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N. 28°13'W., 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50' curve to the left (chord bearing and distance N.45°54'W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE $\frac{1}{4}$ , said Section 35; thence N.1°43' W., 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

7. That of that portion of the SW $\frac{1}{4}$  of Section 25, the SE $\frac{1}{4}$  of Section 26, the NE $\frac{1}{4}$  of Section 35, and the NW $\frac{1}{4}$  of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE $\frac{1}{4}$ , said Section 26, bears N.75°30'W., 949.62 ft. dist.; thence S.80°00'E., 669.00 ft. to the Northeast Cor., thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N.81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

8. That the projected future needs of the reserved lands of the United States specified above are significant and substantial in quantity as compared to present uses and not in the category of minor, modest, or insignificant in amount.

#### CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of § 75-4-2 to 75-4-8 N.M.S.A., 1953.

2. That § 75-4-8 N.M.S.A., 1953, requires that the decree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use. . ."
3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.
4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.
5. When the Ft. Bayard Military reservation was discontinued and ceased to exist as a military reservation, whatever water rights which may have existed for military purposes and uses also ceased to exist.
6. In respect to the above-described lands transferred to the Department of Agriculture on January 2, 1941, to be administered as part of the Gila National Forest, the United States owns water rights for the requirements and purposes of the forest uses, with the priority date of January 2, 1941.
7. It has been stipulated that water rights appurtenant to the above-described lands transferred to the State of New Mexico on July 1, 1966, will be recognized and determined according to the constitution and laws of the State of New Mexico.
8. In respect to that portion of the Ft. Bayard military reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1896, for the requirements and purposes of the said cemetery.
9. That in addition to the above-listed present uses adjudicated to the United States, the United States is entitled to have adjudicated to it such additional



rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

10. That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States.
11. That among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping, and hunting.
12. That until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.
13. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year after the order is entered on this report, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

IT IS SO ORDERED.

---

Special Master

---

, 1974.

LAW OFFICES OF  
SUTIN, THAYER & BROWNE  
A PROFESSIONAL CORPORATION

800 Simms Building  
Post Office Box 1945  
Albuquerque, New Mexico 87103  
505-842-8200

December 5, 1974

Mr. Richard A. Simms  
Special Assistant Attorney General  
Office of the State Engineer  
Bataan Memorial Building  
Santa Fe, New Mexico 87501

Mimbres Valley Irrigation Co. v. Salopek, et al.,  
Luna County Cause No. 6326

Dear Mr. Simms:

Your letter of November 22 enclosing Findings of Fact and Conclusions of Law to be signed by me has been received. I have not signed the same because I was not clear as to whether or not the United States would communicate with me as to their position before I did so. Almost two weeks have passed and I have heard no word from them. However, I wanted to be sure that there was no reason why I should not go ahead and sign them. Accordingly, I would ask that I be advised by return mail in this regard.

Also, I note the item concerning the minimum flow claims and the request that both parties be permitted to file a brief concerning the same. This, of course, is agreeable and I would only inquire if these Findings and Conclusions should be retained until that can be accomplished. Just as a precaution that this not delay the matter indefinitely, I would request that I have the memo from both of you by January 1. If this is not agreeable, you may advise.

In the last paragraph of your letter you mentioned the airport well with a right to 2.01 acre feet and state that this has been omitted from the Findings. How do you propose to handle the omission?

Very truly yours,

/s/ Irwin S. Moise  
IRWIN S. MOISE  
Special Master



[Filed in State District Court Jan. 13, 1975]

OBJECTIONS OF UNITED STATES TO PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW  
SUBMITTED BY THE STATE OF NEW MEXICO  
ON NOVEMBER 22, 1974.

The United States interposes the following objections, together with points and authorities in support of its objections, to the proposed findings of fact and conclusions of law submitted by the State of New Mexico on November 22, 1974.

I. *Minimum Streamflows.*

The United States objects to the exclusion of three items of minimum streamflows as shown in its computer printouts. The State is in error in its statement that there was no discussion of the minimum streamflow items listed in the computer printouts at the hearing in Deming on October 9, 1973. Mr. Norm Ritchey testified under oath that these minimum streamflows of 2 cubic feet per second each had been set by the forest officials for the maintenance of fish life in the streams in question. There was considerable evidence with respect to one of these streams that this streamflow was for the preservation of a variety of trout native to that area which is on the endangered species list.

\* \* \*

II. *Airport Well.*

The United States objects to the failure of the proposed findings of fact to recognize the right of the United States to use 2.01 acre feet of water per year for forest purposes from the Airport Well. It is conceded that the right to use this water is not a reserved water right since this well is not on lands withdrawn from the public domain for forest purposes. The water, however, is used for valid forest purposes, i.e., domestic, administrative, and fire-fighting, the most critical of these uses being firefighting. Water from this well is used for mixing slurry which is loaded into the forest service firefighting planes.

This action was intended to be for the adjudication of all water rights of the United States within the Rio Mimbres watershed. No evidence was introduced with respect to this use because it had never been challenged until the proposed findings were prepared by the State of New Mexico. If additional evidence on this question is desired we will be happy to provide it.

The United States may acquire water rights by other means than reserving them along with public lands for a particular purpose or compliance [*sic*] with State law. *Dugan v. Rank*, 372 U.S. 609 (1963), *City of Fresno v. California, et al.*, 372 U.S. 627 (1963). The United States has made a valid appropriation of the waters from the Airport Well by putting them to beneficial use for forest purposes. Had we known that this use was to be contested, evidence would have been introduced at an earlier date. If evidence is desired at this time we can supply it.

III. *Conclusion of Law No. 11.*

The United States objects to proposed conclusion of law No. 11 which reads as follows:

That until the enactment of multiple use-sustained yield act on June 12, 1960 (74 Stat. 215, 16 U.S.C. 528) no act of Congress authorized the use of waters for substantial recreational reservoirs, winter sports facilities and other substantial works involved large consumptive uses.

This question has not been briefed or argued in this case. As Noted in part one of this memorandum, however, the Multiple Use Act was not a new authority for uses of National Forest lands and resources but was merely a re-affirmation of policy and practices that have been in existence and had been recognized and sanctioned by Congress from the time National Forests were originally established.

At the present time there are no substantial impoundments of waters within the Mimbres watershed for forest purposes. It is suggested that appropriate time to decide the issue with respect to substantial impoundments is when

the United States submits its list of future needs and requirements for water if any of these future needs involve "substantial" impoundments.

Respectfully submitted,

VICTOR R. ORTEGA  
United States Attorney

By: James B. Grant  
JAMES B. GRANT  
Asst, U.S. Atty.

/s/ Donald W. Redd  
DONALD W. REDD  
Atty, Dept. of Justice  
Washington, D.C. 20530

[Submitted to Special Master Jan. 31, 1975]

# STATE'S MEMORANDUM BRIEF

In its Objections to Proposed Findings the United States remarked that it could not "understand New Mexico's objection to the minimum streamflows in question since they deprive no private user of any water. To the contrary, these minimum flows if maintained help to ensure a water supply for downstream users outside the National Forest boundaries." It should be noted initially, however, that a right to a minimum instream flow can be utilized in only one situation, namely where there is a junior upstream appropriator whose right could give way to the government's in times of shortage. If there is no upstream appropriator the so-called right to a minimum flow is purely fanciful, i.e., it would be legally insignificant in that it could be enforced only against God, who is neither a party to this adjudication nor amenable to service [*United States ex rel. Gerald Mayo v. Satan and His Staff*, 54 FRD 282 (W.D. Penn. 2971)]. The issue, consequently, is whether the United States should have the right to shut off an upstream appropriator on the basis of alleged water uses inimical to both the purposes for which the forests were created and to appropriation water law theory.\*

According to the United States the question has already been answered:

In the case of *Arizona v. California*, § 73 U.S. 546 (1963), the Special Master in his report found that the National Forests in the lower Colorado River Basin were established for the following purposes: (1) the protection of watersheds and *the maintenance of natural flow in streams* below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) *protection and propation of wildlife*; and (5) *recreation for the general public*. (Master's Report, p.96 (1960), Emphasis added by United States, p. 3, Objections).

\* The issue could arise in one other way, namely in the context of an application to change point of diversion.



One supposes that the Master's use of the phrase "*the maintenance of natural flow in streams*" indicates his belief that minimum instream flows are legitimate reserved water rights, but the emphasis is rather obviously misplaced. Without the emphasis provided by the United States the *Report* reads as follows: One purpose of the National Forests was "the protection of watersheds and the maintenance of natural flow in streams below the sheds. . . ." The phrase to emphasize, in our view, is "*below the sheds*;" in other words, the purpose described by the Master was that of managing the water sheds in order to ensure—to the extent humanly possible—an adequate and reliable supply of water for the downstream users. This purpose is accomplished, of course, by prudent watershed management, and not by the judicial recognition of an alleged water right which could not possibly help to provide water downstream. We must conclude consequently, that if the question of minimum instream flows was considered by Mr. Rifkind, it was his view that they should not, by a useless judicial act, be elevated to inconsequential possessory interests, but rather should be protected by prudent watershed management in order to ensure a reliable yield for the benefit of the downstream users.

The truth of the matter, of course, is that the question of whether the United States has a reserved right to minimum flows was not considered in *Arizona v. California*, just as it has not been considered as such in any reported opinion that we are aware of. Within the framework of appropriation law there have been analagous decisions holding that man-made diversions are required in order to appropriate public waters. [See, e.g., *State ex rel. Reynolds v. Miranda*, 83 N.M. 443, 493 P.2d 409 (1972); *Walsh v. Wallace*, 26 Nev. 299, 67 P.914 (1902)]. The question at hand, however, can be resolved only by determining whether reserved rights to minimum flows were within the purposes for which the national forests were established. It is New Mexico's view that until quite recently such "uses" were never remotely considered as water rights by either Congress or the forest administrators. On the contrary, as we shall point out, the govern-

ment's claims to minimum flows amount to a new wave of reserved right assertions—a second generation of reserved rights which would do little more than effect an apotheosis of the government's physical dominion over forest waters.

Initially it must be remembered that until *Pelton Dam* in 1955 the Winters doctrine was a limited exception to the government's deference to state water law. As noted in *California—Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164, 55 S.Ct. 725, 79 L.Ed 1356 (1935):

. . . following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states . . . with the rights in each (state) to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' *Kansas v. Colorado*, 206 U.S. 46, 94, the full power of choice must remain with the state.'

Before *Pelton Dam* the Winters doctrine was provincially Indian in application, having never been applied to any federal reservation of public lands except Indian reservations. A broader application of the doctrine was simply unexpected:

There was no hint that the doctrine might be applicable to other reservations or withdrawals of the public domain if any decision, writing or federal agency practice until 1955, when the Supreme Court decided what has come to be known as the 'Pelton Dam' case. . . (Trelease, Frank 4., *Federal-State Relations in Water Law*, National Water Commission Legal Study No. 5 (1971), p.105).

Prior to 1955, then, no one had recognized federally reserved water rights in national forests or any other federal enclave except Indian reservations. Accordingly, the United States treated its non-Indian lands differently insofar as water matters were concerned. Typically,

Congress authorized the appropriation of federal money in order to secure within the framework of state law the water rights necessary to the administration of other federal land reserves. (See, e.g. 16 U.S.C. § 526 (1964)). It was the policy of the Forest Service, as well, to comply with state law in the acquisition of water rights: "Rights to the use of water for National Forest purposes will be obtained in accordance with state law." [*Forest Service Manual* (1936)]. While there was no express indication that state law was to have been the only source of national forest water rights, the Agriculture Organic of Sept. 21, 1944, Ch. 412, Title II, § 3213 (58 Stat. 737, 16 U.S.C. § 526 (1964)), specifically authorized appropriation of funds "for the investigation and establishment of water rights, including the purchase thereof of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forest." [Cf., generally, Bradshaw, David S., "Water in the Woods: The reserved-Rights Doctrine and National Forest lands," 20 Stan. L. Rev. 1187 (1968)].

Without the post-Pelton reservation doctrine, then, it was the policy of the Forest Service to comply with New Mexico law in seeking to make appropriations of waters which at the time were thought to be in the public ownership of New Mexico's citizens. Indeed, as late as 1955 the United States Forest Service had made such applications for the Gila National Forest (State Engineer Permits Nos. 2844 & 2868, issued on May 31, 1955, and October 10, 1955, authorizing the appropriation of 2.4194 acre-feet and 2.1494 acre-feet respectively). In view of this situation it is unlikely that either Congress or the Forest Service entertained the thought of acquiring legally recognized rights to minimum stream flows when the concept of a usufruct occurring in nature was repugnant to the water laws with which the Forest Service would have complied. [Cf., e.g., *Harkey v. Smith*, 31 N.M. 521, 217 P.550 (1926)]. In short, prior to 1955, the notion was unimaginable, and it has only been since the Forest Service was given a novel theory upon which to

assert its claims that it developed the imagination with which to envision minimum stream flows as legally cognizable water rights.

In support of its new claims—this second generation of reservation water rights—the United States explains that:

(a) review of the history of the National Forests reveals clearly that the claimed instream uses have been essential and valid purpose of the National Forests from the time they were created . . . official records establish that even before the Forests had been withdrawn they had long been used for recreational purposes requiring the maintenance of adequate streamflows. (*Objections*, p.3).

The allegation, however, is a *non-sequitur*. New Mexico recognizes that people have historically fished in the streams of our national forests, but unlike the United States New Mexico believes this only demonstrates the obvious geographical and historical reality that national forests tend to be created in the headwaters and highlands of the western states, and it has naturally followed that fishermen have fished in forest streams. They will certainly continue to do so after the United States' claims for a minimum streamflow are denied; in other words, the proclivity of fish to reside in forest streams is not a specific congressional recognition of a minimum streamflow as an essential purpose for which the forest reservation was made. Indeed, fishermen fish in many stream sections outside forest lands in New Mexico, and no one has ever seriously contended that a "water right" resulted in favor of the fisherman.

The legislative keystones of the national forest system are the Creative Act of March 3, 1891 [16 U.S.C. § 471 (1964)] and the Organic Administration Act of June 4, 1897 [16 U.S.C. § 475 (1964)]. The Creative Act authorized the establishment of national forests. It states in pertinent part:

The President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in any part



of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

The statute on its face is uninformative about the purposes of the national forests. Accordingly, in 1897 Congress set out to clarify the functions of the national forests and adopted a statement of "purposes for which national forests may be established and administered" as part of the Organic Administration Act. This provision reads in pertinent part as follows:

All public lands designated in reserve prior to June 4, 1897, by the President of the United States under the provisions of Section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established except to *improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States*; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. (Emphasis added)

This statute stands as an unambiguous assertion of the purposes of our national forests, and remained the only legislation which set forth the criteria for the creation of national forests until the enactment of the Multiple Use-Sustained Yield Act in 1960 [16 U.S.C. § 528 (1964)]. Basically, two purposes were authorized, namely the protection of the watershed in order to ensure dependable water supplies for downstream appropriators,

and protection of the forest in order to secure an adequate and continuous supply of timber. These two purposes, unamended by federal legislation until 1960, are made even more clear by the legislative history of the two fundamental acts.

The provision of the Creative Act authorizing creation of national forests was passed as § 24, entitled "An Act to repeal the timber culture laws, and for other purposes." The timber culture statutes were regarded as ineffectual at best, and in some instances as invitations to fraud. [See 21 Cong. Rec. at 2341, 51st Cong. First Sess. (1890)]. Out of this concern to insure sustained timber yield and protect water supplies, Congress authorized the creation of national forests. Action was urged to:

secure the magnificent forests on these lands from destruction by axe and flame within a comparatively short period . . . that will be needed as an important source of timber supply for the western states for all time to come . . . the greatest value of these forests to the present and future inhabitants of the western states is in the assistance they render to agriculture through their influences on the water supply and the climate . . . there is absolutely nothing, natural or artificial, that will take the place of the mountain forest as a regulatory of rainfall and water supply. [Memorial of the American Forestry Association, 21 Cong. Rec. at 2537-38, 51st Cong., 1st Sess., (1890)].

By 1897 about 17 million acres of the public domain had been set aside as national forests. [30 Cong. Rec. 908, 919, 55th Cong. 1st Sess., (1897)]. In 1896 the Secretary of the Interior, in conjunction with the National Academy of Sciences, appointed a committee of scientists to examine the national forests and recommend changes in policy. This action reflected the contemporary apprehension that the national forests had been insufficiently attended by the federal government and consequently suffered from uncontrolled fire, grazing, and timber cutting. [Cf., "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inaugura-

tion of a Forest Policy for the Forested Lands of the United States to the Secretary of the Interior," May 1, 1897, Senate Doc. No. 105, 55th Cong. 1st Sess., (1897)]. The Committee recommended, among other proposals, that the President reserve about 21 million additional acres of land in Wyoming, Utah, Montana, Washington, Idaho, and South Dakota. On February 22, 1897, President Cleveland issued an executive order reserving the parcels designated by the Committee. (30 Cong. Rec. 900) These reservations provoked sustained protests from Western Congressmen, who objected that the boundaries were drawn indiscriminately and that the economic survival of thousands of people living within the limits of the new reservations was threatened. (Id., p. 908). Congress reacted by suspending the executive order of February 22, 1897, by defining the purposes for which the forest could be reserved, and by adopting a set of provisions concerning forest management and economic uses within the forest. Accordingly, it can be seen that the statement of purposes embodied in 16 U.S.C. § 475 was part of a restrictive measure designed to control the development of our national forests.

The Congressional debates and Committee reports pertaining to the Organic Administration Act also support the construction that Congress perceived the need for national forests in terms of protection of timber and conservation of the capacity of watershed lands to continuously produce a steady water supply. In this regard Senator White from California remarked:

We are interested, as Senators have said, in the preservation of the forests; we are interested in conserving the water supply. (30 Cong. Rec. p. 917).

Representative McRae from Arkansas, one of the authors and principal sponsors of both the 1891 Act and the 1897 Act, elaborated at length upon the need for national forests:

Common sense and science, I think, will agree that the forest cover will hold both the rainfall and melting snow, so that they will not rush to the streams

in torrents in the spring and early summer. We all know that in a well timbered country the water goes more gradually into the streams and gives a steadier flow, with fewer overflows and less low water.

As long as the forests stand, the branches, fallen leaves, and roots will hold much of the rain and snow until summer, and thus furnish water not only for navigation of our rivers, but also for the irrigation of the deserts.

...

The objects for which the forest reservation should be made are the protection of the forest growth against destruction by fire and axe, and preservation of forest conditions upon which water conditions and water flows are dependent. The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these forest reservations for other purposes. They are not parks set aside for non-use but have been established for economic reasons.

It is therefore necessary to prescribe the manner and method by which the timber growing thereon, and mineral contained therein, the water power furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which they are established. (30 Cong. Rec. at 966).

Representative Ellis from Oregon emphasized the function of national forests in preserving a water supply, as opposed to maintaining merchantable timber:

They [the people of the West] believe in setting apart reasonable reservations near the headwaters of the streams, if you please, especially such as afford water supplies to cities, if there be any such. . .

... as well remarked by the gentleman from Colorado [Mr. Bell] yesterday, the purpose of his forest reser-



vations is not to save the timber for future use so much as to preserve the water supply.

....

I take it, Mr. Chairman, that these reservations of forests and setting them apart are for the purpose of preserving the merchantable timber, but that is not the real object, it is for the preservation of the water supply. 30 Cong. Rec. p. 1006-07.

Representative Ellis' remarks were echoed in the same session by Representative Loud from California, whose comments further indicate the basic concern was to establish and manage forests in order to preserve the waters arising therein for the use of the people below the watershed:

. . . I want to say further that the only object of the forest reserves in this State of California is to retain the snows upon the mountains, so that the snows and rains of the spring will not bring down all at once the full flood upon our valleys, where irrigation is carried on to a great extent and where it is a necessity, as it is for the production of the crops of the great San Joaquin Valley.

That is the main object of the forest reserves in the State of California . . . 30 Cong. Rec. at 1399.

Finally, the "Report of the Committee upon the Inauguration of the Forest Policy" (Sen. Doc. No. 105), which precipitated the Organic Administration Act, emphasized the same two fold principle:

The influence of forests upon climate, soil, and the flow of water in streams has attracted much attention during the past century. . .

Your committee is of the opinion that is not only desirable but essential to national welfare to protect the forested lands of the public domain, for their influence on the flow of streams and to supply timber and other forest products. . .

It is the opinion of your committee that, while forests probably do not increase the precipitation of moisture in any broad and general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of western North America is dependent upon irrigation. p. 36.

The legislative history of the Creative Act and the Organic Administration Act, the first of which provides the authority to reserve lands from the public domain as national forests, and the second of which describes the purposes for which the forests could be reserved, make it abundantly clear that a major purpose of forest reservations is the protection of the watershed in order to provide water not to the forest administrators but to the water users below the sheds. In this light the tendentious character of the government's analysis of the legislation becomes apparent. In quoting § 24 of the Creative Act, for instance, the United States emphasizes the clause that makes it possible to reserve forest lands having no commercial value:

Sec. 24. The President of the United States of America may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, *whether of commercial value or not, as national forests*, and the President shall by public proclamation declare the establishment of such forests and the limits thereof. (Objections, p. 3).

The United States then cites to B. E. Fernow's *Report of the Chief of the Division of Forestry* (1891), noting his belief that the secondary objects of the forests were aesthetic and recreational.\* Curiously, though, the conclusion the government draws is that because the forests need not be of commercial value and because Fernow wanted to encourage hunting and fishing, "uses of the National Forests involving instream uses and requiring

\* These, of course, are not found in the legislation, but to Fernow, as to most of us, they seem reasonable.

a continued adequate flow of water were considered and implemented." (Objections, p. 5). However, as is clear from a reading of the legislation and its history, there is less extraordinary explanation of the fact that the forest reserves need not be of commercial value, viz., that the lands were reserved not only for the preservation of economically valuable timber, but also to preserve and manage the watershed in order to ensure a dependable water supply. Prudent watershed management, of course, is desirable wherever it might protect the downstream appropriators from uncontrolled, capricious runoff—regardless of whether the watershed timber has any commercial value. In other words, from the fact that the Creative Act authorized the reservation of forest lands having no commercial value we need not conclude that some forests are reserved primarily for recreation and of necessity must be judicially assured of minimum flows. On the contrary, we should conclude that all forests were reserved for the protection of downstream water users, and not in order to protect the proprietary interests of the United States in derogation of the rights of others.

Continuing its argument the United States refers to the Organic Administration Act, without reviewing its legislative history, and concludes that "(a) careful reading of the entire provision as a unit is necessary to grasp the real intent of Congress." (Objections, p. 6). Under-emphasizing the *stated* purposes of "securing favorable conditions of waterflows" and furnishing "a continuous supply of timber," the government elicits the "real intent" as follows:

The Act further provides that:

The Secretary of Interior (now the Secretary of Agriculture, 33 Stat. 628) shall make provisions for the depredations upon the public forests and forest reservations which may have been set aside for which may hereafter set aside under the said Act of March 3, 1891, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, *namely, to regulate their occupancy and use* and to preserve the forests thereon from destruction. (Id., p. 6, emphasis added by United States).

"This mandate for regulations for the occupancy and use of the Forests," the government concludes, "indicates that Congress envisioned uses broader than watershed protection and timber production, namely, multiple use and utilization of all of the resources of the National Forests." Once again, however, there is a less extraordinary interpretation of the phrase in light of the legislative history that produced it, namely that human beings had to occupy and use the forests in order to accomplish the stated purposes for which the forests had been reserved, e.g. sheepherders, cattlemen, and timbermen.

In view of the explicit language of the Creative Act and the Organic Administration Act as to the purposes for which national forests were to be created, and in view of the relevant legislative history of the two acts, it is clear in our opinion that no recreational uses were authorized which would have required the assertion of judicially recognizable "rights" to minimum flows. It is also our view that the government's analysis in this regard is patently wrong. Additionally, however, the government argues that the notion of a reserved right to minimum flows—established as incidental to recreation in its earlier argument—has been implicitly recognized and confirmed in numerous appropriation acts, climaxed finally by the Multiple Use-Sustained Yield Act of 1960.

The appropriation acts to which the government alludes are: 1) four acts designating funds "to transport and care for fish and game supplied to stock the National Forests or the waters therein;" 2) acts appropriating funds for outhouses and fire prevention; 3) an authorization providing that the Secretary of the Interior can rent or lease areas near medicinal springs; 4) an amendment of an appropriation act providing that forest agents shall aid in enforcing state fish and game laws; 5) an act authorizing the use of certain areas for resort facilities; 6) an act authorizing the Secretary of Agriculture to distinguish between forests lands chiefly valuable for stream flow protection or for timber production; 7) an act appropriating funds for wildlife study; and 8) an act authorizing the Secretaries of Agriculture and Interior to cooperate in watershed management. (Objec-



tions, pp. 14-15). In response to this parade of federal legislation New Mexico would ask the following: How do these acts lend support to the judicial recognition of rights to minimum flows? The answer-in short, is that they don't. If there were any recreational advantages to the preservation of forest timber and management of the watersheds it is clear that they were entirely incidental to the stated purposes of the forest reserves. In his *Report of the Chief of the Division of Forestry* for 1891, Fernow described the situation as follows:

The writer has every year in his reports pointed out the need of a change in the policy of the Government with regard to the public timberlands, under which large areas once heavily timbered have been turned into fire-swept barrens, and he has dwelt upon the incongruity of having a division of forestry in a department of the Government to preach rational forest management, while such is entirely absent from the Government timberlands.

A change in this policy seemed at least to be contemplated by the enactment of the law dated March 3, 1891, in which the President is empowered to set aside forest lands for reserves. . .

....

There can hardly be any doubt, however as to what objects and considerations should be kept in view in reserving such lands and withdrawing them from private occupancy. These are first and foremost of economic importance, not only for the present but more especially for the future prosperity of the people residing near such reservations, namely, first, to assure continuous forest cover of the soil and mountain slopes and crests for the purposes of preserving or equalizing water flow in the streams which are to serve the purposes of irrigation, and to prevent formation of torrents and soil-washing; second, to assure a continuous supply of wood material from the timbered areas by cutting judiciously and with a view to reproduction. Secondary objects, such as can

and will be subserved at the same time with those first cited are those of an aesthetic nature, namely, to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure. Both objects are legitimate, but the first class is infinitely more important, and the second is easily provided for in securing the first.

Since there have arisen misconceptions in regard to these propositions it may, perhaps, be proper to emphasize the fact that the multiplication of national parks in remote and picturesque regions was not the intent of the law, but it was specifically designed to prevent the great annual conflagrations, to prevent useless destruction of public property, to provide benefit and revenue from the sale of forest products as needed for fuel and lumber by residents of the locality, and altogether to administer this valuable and much endangered resource for present and future benefit. These, I take it, are the objects of the proposed reservations.

Forest management, such as contemplated, does not destroy natural beauty, does not decrease but gives opportunity to increase the same, and tends to promote the greatest development of the country, giving regular and steady employment, furnishing continuous supplies, and making each acre to its full duty in whatever direction it can produce most, pp. 223-25.

As voiced by the Chief Forester, it was the position of the Department of Agriculture that forest recreation, such as hiking, camping, and fishing, was a "purpose" of the forests only to the extent it was incidental to the explicit goals of timber management and watershed protection. Subsequent appropriation acts which recognized these incidental advantages of the forest reserves in no way detract from the fact that the forests were established to protect the watersheds from destruction by fire and excessive logging and to insure an ade-

quate supply of timber. Conservation of the watershed yield was paramount and reflected the contemporary anxiety that the disappearance of the forest cover would lead to rapid spring snow-melts and massive erosion, resulting in rampaging streams in the spring and dry streams in the summer. The thrust of this effort was not to guarantee to the forest administrators minimum flows for aquatic habitat, but rather to further the utilitarian principle of securing an economically dependable source of water for downstream appropriators. To achieve this end Congress did not suggest that the courts effect an apotheosis of the water supplied by nature. On the contrary, it may be reasonably assumed that Congress, like the State of New Mexico, continues to have a tacit faith in the hydrologic cycle.

The Multiple Use-Sustained Yield Act of 1960 (74 Stat. 215, 16 U.S.C. § 528) is the first piece of federal legislation to explicitly broaden the purposes of our national forests:

*Sec. 1—It is the policy of the Congress that National Forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of the Act are declared to be supplemental to, but not in derogation of, the purposes for which the National Forests were established as set forth in the Act of June 4, 1897.*

As the United States has pointed out by reference to House Report No. 1551 and Senate Report No. 1407:

*"The addition of the sentence to follow the first sentence in section 1 is to make it clear that the declaration of congressional policy that the national forests are established and shall be administered for the purposes enumerated is supplemental to, but is not in derogation of, the purposes improving and protecting the forest or for securing favorable conditions of water flows and to furnish a continuous supply of timber as set out in the cited provision of the act of June 4, 1897.*

In other words, the United States cannot glean even from the Multiple Use-Sustained Yield Act the basis upon which to assert a right to minimum flows if such a right would take away from the purpose of securing the stream flows for other appropriators. In the case at bar, where there is an upstream appropriator, this is precisely what a judicial recognition of the government's claim would accomplish.

In conclusion two things are clear: 1) that a claim to a reserved water right for minimum stream flows in our national forests would have been inconceivable prior to the Pelton Dam decision in 1955, and 2) that the purposes for which our national forests have been reserved militate against the minimum flow claims. It should also be remembered that the government is not relying on explicit support but rather an implication. In effect, the United States is urging upon the court an unprecedented enlargement of the reservation doctrine on the basis of a chain of inferences, none of which is even a necessary inference. First it is inferred from the early legislation and subsequent appropriation acts that recreation was a recognizable purpose of reserving national forest lands. This, in itself, is unpersuasive in light of relevant legislative history, but on top of this the United States further urges that from the appropriation acts yet another inference must be drawn, namely that minimum flows were indispensable to the administration of the forests. It is New Mexico's belief, on the contrary, that the government's argument is simply untenable. Accordingly, the United States could not have a lawful right to minimum stream flows. If the United States wants guaranteed minimum flows the way to accomplish this end is not by asking a court of equity to declare that there will be such flows, but rather by complying with the statutes authorizing the creation, use, and administration of the forests, i.e., to manage the forest



watersheds in such a way as to secure "favorable conditions of water flows."

/s/ Richard A. Simms  
 RICHARD A. SIMMS  
 Special Assistant Attorney General  
 State Engineer Office  
 Battan Memorial Bldg.  
 Santa Fe, New Mexico 87503  
 Attorney for Plaintiff

February 24, 1975

The Honorable Irwin S. Moise  
 Sutin, Thayer & Browne  
 P. O. Box 1945  
 Albuquerque, New Mexico 87103

Re: Mimbres Valley Irrigation Co. v. Salopek, et al.,  
 Luna County Cause No. 6326.

Dear Justice Moise:

I am writing to confirm the setting of March 6, 1975 for oral argument on the issue of minimum stream flows. It is my understanding that the matter will be heard in your office at 1:30 p.m.

Sincerely yours,

/s/ Richard A. Simms  
 RICHARD A. SIMMS  
 Special Assistant Attorney General

March 7, 1975

Honorable Irwin S. Moise  
Sutin, Thayer & Browne  
P. O. Box 1945  
Albuquerque, New Mexico 87103

Re: Mimbres Valley Irrigation Co. v. Salopek, et al.  
Luna County Cause No. 6326

Dear Justice Moise:

After some consideration of your decision yesterday, and in view of your willingness to have the findings and conclusions drawn in such a way as to indicate that the decision is not a precedent for the general proposition that the United States has reserved rights for minimum stream flows in our national forests, it occurs to me that certain matters should be clarified before I can draft the findings and conclusions appropriately.

During oral argument I urged that the only way a right to federally reserved minimum stream flows could be utilized would be in derogation of one of the two express purposes of the forest reserves, namely the management of the watershed in such a way as to maximize the yield to downstream appropriators. As I understand your decision you agree with this proposition as a general matter, but within the facts of the instant case it is your view that it would not be in derogation of a junior appropriator's right for the United States to assert a minimum flow right against a *transferred* use on private property within the forest. In this regard you stated, as I recall, that the state legislature could rescind the right of an appropriator to change his place or method of use, and accordingly the assertion by the United States of a minimum flow right against a junior transfer would not be in derogation of the transferred right. Where I am confused, however, is in the situation where the junior appropriator has always exercised his right on private property within the forest, at a point upstream from the stretch of the stream

wherein a minimum flow is claimed. Under these facts, as I understand your decision, the United States would not have a right to a minimum flow.

The distinction, of course, is extremely important, and after the argument yesterday I failed to have the matter clarified. As you can understand, however, I would like to tailor the legal conclusions in this regard to the facts of this adjudication in as precise a way as possible. For this reason I thought it would be useful to request that the matter be clarified before I draft the relevant findings and conclusions.

Sincerely,

RICHARD A. SIMMS  
Special Assistant Attorney General



LAW OFFICES OF  
SUTIN, THAYER & BROWNE  
A PROFESSIONAL CORPORATION

800 Simms Building  
Post Office Box 1945  
Albuquerque, New Mexico 87103  
505-842-8200

March 11, 1975

Mr. Richard A. Simms  
Special Assistant Attorney General  
Office of State Engineer  
Bataan Memorial Building  
Santa Fe, New Mexico 87501

Mimbres Valley Irrigation Co. v.  
Salopek, et al., Luna County  
Cause No. 6326

Dear Mr. Simms:

I have your letter of March 7 stating that you are somewhat confused as to how to prepare the Findings on the issue of minimum stream flows which was argued last week. You state that your confusion arises "in the situation where the junior appropriator has always exercised his right on private property within the forest, at a point upstream from the stretch of the stream wherein a minimum flow is claimed."

As I understood the facts, this is not the situation in the instant case and that there is no appropriation by individuals above these stretches where a minimum flow is sought. Accordingly, the Finding should be to this effect and, these facts being true, the minimum stream flow is adjudged to the United States.

If, in fact, the situation were as you indicate, the ruling might be different, but the Findings and Conclusions here should only cover the situation under the facts as found.

I trust that this answers your question. If it does not, you may communicate with me again.

Very truly yours,

/s/ Irwin S. Moise  
IRWIN S. MOISE

[Submitted to Special Master March 14, 1975]

## STATE'S SECOND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on October 9, 1973, and the Special Master having heard the evidence and argument of the parties, finds the facts and states the conclusions of law as follows:

### FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:
  - a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: land located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.
  - b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11,

- 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W. N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.
- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.
- d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13 and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.
3. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within



the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W.; Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.

2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
1 15S 11W	024	2.00		Fish	3-2-1899
— 16S 10W	200		2.21	Stockwater	7-21-1905
— 16S 9W	206		.51	Stockwater	7-21-1905
4 16S 9W	207		.01	Domestic Residential	7-21-1905
— 16S 9W	225		3.09	Stockwater	7-21-1905
16 19S 9W	226		.03	Domestic Recreational	7-21-1905
18 16S 9W	229		.03	Domestic Recreational	7-21-1905
18 16S 9W	230		.03	Domestic Recreational	7-21-1905
19 16S 9W	231		.01	Domestic Recreational	7-21-1905
— 16S 10W	249		1.00	Stockwater	6-18-1908
— 17S 9W	264		3.52	Stockwater	7-21-1905
— 17S 9W	281		3.21	Stockwater	7-21-1905
— 18S 9W	283		0.98	Stockwater	1910
— 18S 9W	307		3.57	Stockwater	5-9-1910
— 14S 10W	500		9.11	Stockwater	3-2-1899
27 14S 11W	511	2.00		Fish	3-2-1899
28 14S 11W	523		2.50	Stockwater	3-2-1899
35 14S 10W	535		.02	Domestic Residential	3-2-1899

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
35 14S 10W	536		.02	Stockwater	3-2-1899
— 15S 11W	544		6.97	Stockwater	3-2-1899
— — —	588		8.82	Stockwater	3-2-1899
— 16S 10W	587		12.65	Stockwater	3-2-1899
31 15S 11W	614		3.00	Domestic Recreational	3-2-1899
7 16S 11W	639		6.87	Domestic Residential	5-9-1910
— 16S 12W	668		1.89	Stockwater	7-21-1905
— 16S 11W	674		2.94	Stockwater	7-21-1905
— 17S 12W	689		1.09	Stockwater	7-21-1905
— 17S 12W	698		4.94	Stockwater	7-21-1905
— 16S 12W	726		.63	Stockwater	7-21-1905
1 15S 11W	786	2.00		Fish	3-2-1899
7 16S 13W	800		.51	Stockwater	7-21-1905
— 17S 13W	804		2.64	Stockwater	3-2-1899
— — —	881		6.50	Roadwater	1905
10 17S 16W	901		0.12	Domestic	1908
17 17S 14W	904		.10	Wildlife	6-18-1908
— 12S 15W	907		1.65	Stockwater	2-6-1907
17 17S 14W	946		.01	Domestic	1908
Total		6.00	91.18		

3. That there are no private junior appropriators upstream of the above-listed instream uses numbered 024, 511, and 786.
4. That said instream uses numbered 024, 511, and 786 can be made without raising the possibility of interference with the rights of junior upstream appropriators.
5. That said instream uses numbered 024, 511, and 786 can be made without interfering with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators.
6. That the United States owns lands as follows which were reserved for military use as the Ft. Bayard

Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to a point thirteen chains south of the north line of the southwest  $\frac{1}{4}$  of Section 10; thence east to the west line of northeast  $\frac{1}{4}$  of southwest corner of same; thence east along the south line of same and along south line of northwest  $\frac{1}{4}$  of southwest  $\frac{1}{4}$  of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast  $\frac{1}{4}$  of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.

7. That on January 2, 1941, all of the lands of the Ft. Bayard Military Reservation except the SE  $\frac{1}{4}$  of Section 25, the SE  $\frac{1}{4}$  of Section 26, the NE  $\frac{1}{4}$  of Section 35, and the NW  $\frac{1}{4}$  of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U.S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.
8. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW  $\frac{1}{4}$  of Section 25, the SE  $\frac{1}{4}$  of Section 26, the NE  $\frac{1}{4}$  of Section 35, and the NW  $\frac{1}{4}$  of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.

9. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of agriculture:

All that part of the SW  $\frac{1}{4}$ , Section 25; SE  $\frac{1}{4}$ , Section 26; NE  $\frac{1}{4}$ , Section 35; and NW  $\frac{1}{4}$ , Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE  $\frac{1}{4}$ , said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29°43'E., 37.30 ft. to Cor. No. 1-B; thence N.60°17'E., 21.25 ft. to Cor. No. 1-C; thence N.29°43'W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW  $\frac{1}{4}$ , said Section 25; thence S.18°30'E., 2380.00 ft. to Cor. No. 3; thence S.47°59'W., 1573.40 ft. to Cor. No. 4; thence S.23°00'W., 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW  $\frac{1}{4}$ , said Section 36; thence S.89°03'W., 2504.57 ft. to Cor. No. 8 on the South line of the NE  $\frac{1}{4}$ , said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13'W., 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50' curve to the left (chord bearing and distance N.45°54'W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE  $\frac{1}{4}$ , said Section 35; thence N. 1°43'W., 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

10. That of that portion of the SW  $\frac{1}{4}$  of Section 25, the SE  $\frac{1}{4}$  of Section 26, the NE  $\frac{1}{4}$  of Section 35, and the NW  $\frac{1}{4}$  of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mex-



ico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE  $\frac{1}{4}$ , said Section 26, bears N.75°30'W., 949.62 ft. dist.; thence S.80°00'W., 669.00 ft. to the Northeast Cor.; thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N. 81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

11. That the projected future needs of the reserved lands of the United States specified above are significant and substantial in quantity as compared to present uses and not in the category of minor, modest, or insignificant in amount.
12. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

#### CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of § 75-4-2 to 75-4-8 N.M.S.A., 1953.
2. That § 75-4-8 N.M.S.A., 1953, requires that the decree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."
3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.

4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.
5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.
6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Finding 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.
7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.
8. That in addition to the above-listed present uses adjudicated to the United States, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.
9. That with respect to the above-listed uses in the Gila National Forest where the use has been made

under permit of the United States Forest Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States.

10. In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511, and 786, and consequently, because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.
11. That among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.
12. That until the enactment of the Multiple Use—Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.
13. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year after the order is entered on this report, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall

have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

IT IS SO ORDERED.

---

Special Master

---

, 1975.



[Filed in State District Court Apr. 2, 1975]

OBJECTIONS OF UNITED STATES TO PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW  
SUBMITTED BY THE STATE OF NEW MEXICO  
ON MARCH 14, 1975.

The United States interposes the following objections together with points and authorities in support of its objections to the proposed findings of fact and conclusions of law submitted by the State of New Mexico on March 14, 1975.

I

The United States objects to the inclusion of the word "junior" in proposed findings of fact 3 and 4. While it is true that there are no private junior appropriators upstream of the instream uses in question, this statement is misleading. It is also true that there are no senior upstream appropriators. The inference that could be drawn from findings 3 and 4 is that if a junior appropriator were upstream the United States might not have a right to the upstream uses as against that junior appropriator. From this it could be argued, that if a junior appropriator should appear at any time upstream from the instream uses in question, this junior appropriator could then use water at the expense of the rights to minimum streamflows held by the United States. From the statements of the Special Master at the hearing in this case on March 6, 1975, it is clear that this was not what the Special Master intended to find. The United States would have no objections to proposed findings of fact 3 and 4 if the word "junior" were stricken from these findings.

II

The United States objects to proposed finding of fact 5, which reads as follows:

5. That said instream uses numbered 024, 511 and 786 can be made without interfering with the ex-

press purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators.

Apparently the basis for this proposed finding is the finding, quoted at page 2 of the State's memorandum brief, of the Special Master in *Arizona v. California*, 373 U.S. 546, that one of the purposes for which the national forests were founded was "the protection of watersheds and the maintenance of natural flows in streams below the sheds." While it is true that the fulfillment of this particular purpose of the national forest would result in more water available for private appropriators below the national forest, it would also produce other equally valid results such as improved fish and wildlife habitat, fire and erosion protection, aesthetics, recreation, etc. To avoid confusion it is suggested that the exact language of the Special Master in *Arizona v. California*, be used in finding 5, so that it would read:

5. That said instream uses numbered 024, 511, and 786 can be made without interfering with one of the express purposes of the Gila National Forest which is the protection of watersheds and the maintenance of natural flow in streams below the sheds.

III

The United States objects to proposed conclusion of law 10, which reads as follows:

10. In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511 and 786, and consequently because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.

For the reasons stated in objections I and II, we urge that conclusion of law 10 be modified to read as follows:

10. In view of the fact that there are no appropriators upstream of the instream uses numbered 024, 511 and 786, and because said federal uses can be made without interfering with upstream appropriators or with one of the express purposes of the Gila National Forest of managing the watershed for the protection of watersheds and the maintenance of natural flow in streams below these sheds, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.

#### IV

The United States objects to the proposed conclusion of law 12, which reads as follows:

12. That until the enactment of the Multiple Use—Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress authorized the use of waters in national forest for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.

We know of no present uses by the United States on lands or from waters covered by this adjudication that qualify as "substantial works involving large consumptive uses." Therefore, such a finding at this time is totally irrelevant. It is urged that if this question should be decided in this case it should be decided after the United States has submitted its list of ultimate future needs for water on the forest lands in the Mimbres watershed in compliance with conclusion of law 13 and then only if any of the future needs claimed by the United States may properly be classified as "substantial works involving large consumptive uses." Such an important question as this should be decided only when properly raised by the facts in the case

where it can properly be weighed with the circumstances raising the issue.

Respectfully submitted,

VICTOR R. ORTEGA  
United States Attorney

By: /s/ James B. Grant  
JAMES B. GRANT  
Assistant United States Attorney

/s/ Donald W. Redd  
DONALD W. REDD  
Attorney, Department of Justice  
Washington, D.C. 20530



## REPORT OF SPECIAL MASTER

[Filed May 5, 1975]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This cause came on for hearing on October 9, 1973, and the Special Master having heard the evidence and argument of the parties, finds the facts and states the conclusions of law as follows:

## FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:
  - a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: land located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.
  - b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands

- within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.
- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.
  - d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13 and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10,

17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.

3. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W.; Sections 5, 6, 7, 8, 9, 17, 18, T 18S., R. 8W., N.M.P.M.

2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
1 15S 11W	024	2.00		Fish	3-2-1899
— 16S 10W	200		2.21	Stockwater	7-21-1905
— 16S 9W	206		.51	Stockwater	7-21-1905
4 16S 9W	207		.01	Domestic Residential	7-21-1905
— 16S 9W	225		3.09	Stockwater	7-21-1905
16 19S 9W	226		.03	Domestic Recreational	7-21-1905
18 16S 9W	229		.03	Domestic Recreational	7-21-1905
18 16S 9W	230		.03	Domestic Recreational	7-21-1905
19 16S 9W	231		.01	Domestic Recreational	7-21-1905
— 16S 10W	249		1.00	Stockwater	6-18-1908
— 17S 9W	264		3.52	Stockwater	7-21-1905
— 17S 9W	281		3.21	Stockwater	7-21-1905
— 18S 9W	283		0.98	Stockwater	1910

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
— 18S 9W	307		3.57	Stockwater	5-9-1910
— 14S 10W	500		9.11	Stockwater	3-2-1899
27 14S 11W	511	2.00		Fish	3-2-1899
28 14S 11W	523		2.50	Stockwater	3-2-1899
35 14S 10N	535		.02	Domestic Residential	3-2-1899
35 14S 10W	536		.02	Stockwater	3-2-1899
— 15S 11W	544		6.97	Stockwater	3-2-1899
— — —	588		8.82	Stockwater	3-2-1899
— 16S 10W	587		12.65	Stockwater	3-2-1899
31 15S 11W	614		3.00	Domestic Recreational	3-2-1899
7 16S 11W	639		6.87	Domestic Residential	5-9-1910
— 16S 12W	668		1.89	Stockwater	7-21-1905
— 16S 11W	674		2.94	Stockwater	7-21-1905
— 17S 12W	689		1.09	Stockwater	7-21-1905
— 17S 12W	698		4.94	Stockwater	7-21-1905
— 16S 12W	726		.63	Stockwater	7-21-1905
1 15S 11W	786	2.00		Fish	3-2-1899
7 16S 13W	800		.51	Stockwater	7-21-1905
— 17S 13W	804		2.64	Stockwater	3-2-1899
— — —	881		6.50	Roadwater	1905
10 17S 16W	901		0.12	Domestic	1908
17 17S 14W	904		.10	Wildlife	6-18-1908
— 12S 15W	907		1.65	Stockwater	2-6-1907
17 17S 14W	946		.01	Domestic	1908
Total		6.00	91.18		

3. That there are no private junior appropriators upstream of the above-listed instream uses numbered 024, 511, and 786.
4. That said instream uses numbered 024, 511, and 786 can be made without raising the possibility of interference with the rights of junior upstream appropriators.



5. That said instream uses numbered 024, 511, and 786 can be made without interfering with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators.
6. That the United States owns lands as follows which were reserved for military use as the Ft. Bayard Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to a point thirteen chains south of the north line of the southwest  $\frac{1}{4}$  of Section 10; thence east to the west line of northeast  $\frac{1}{4}$  of southwest corner of same; thence east along the south line of same and along south line of northwest  $\frac{1}{4}$  of southeast  $\frac{1}{4}$  of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast  $\frac{1}{4}$  of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township lines; thence west to the point of beginning, containing approximately 8,840 acres.
7. That on January 2, 1941, all of the lands in the Ft. Bayard Military Reservation except the SE  $\frac{1}{4}$  of Section 25, the SE  $\frac{1}{4}$  of Section 26, the NE  $\frac{1}{4}$  of Section 35, and NW  $\frac{1}{4}$  of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U.S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.

8. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW  $\frac{1}{4}$  of Section 25, the SE  $\frac{1}{4}$  of Section 26, the NE  $\frac{1}{4}$  of Section 35, and the NW  $\frac{1}{4}$  of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.
9. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of Agriculture:

All that part of the SW  $\frac{1}{4}$ , Section 25; SE  $\frac{1}{4}$ , Section 26; NE  $\frac{1}{4}$ , Section 35; and NW  $\frac{1}{4}$ , Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE  $\frac{1}{4}$ , said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29°43'E., 37.30 ft. to Cor. No. 1-B; thence N.60°17'E., 21.25 ft. to Cor. No. 1-C; thence N.29°43'W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW  $\frac{1}{4}$ , said Section 25; thence S.18°30'E., 2380.00 ft. to Cor. No. 3; thence S.47°59'W., 1573.40 ft. to Cor. No. 4; thence S.23°00'W., 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW  $\frac{1}{4}$ , said Section 36; thence S.89°03'W., 2504.57 ft. to Cor. No. 8 on the South line of the NE  $\frac{1}{4}$ , said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13' W., 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50' curve to the left (chord bearing and distance N.45°54'W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE  $\frac{1}{4}$ , said Section 35; thence

N.1°43'W., 3493.49 ft. to the place of beginning.  
Containing 482.824 acres, more or less.

10. That of that portion of the SW ¼ of Section 25, the SE ¼ of Section 26, the NE ¼ of Section 35, and the NW ¼ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE ¼, said Section 26, bears N.75°30'W., 949.62 ft. dist.; thence S.80°00'E., 669.00 ft. to the Northeast Cor.; thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N.81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

11. That the projected future needs of the reserved lands of the United States specified above are significant and substantial in quantity as compared to present uses and not in the category of minor, modest, or insignificant in amount.
12. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

#### CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of §§ 75-4-2 to 75-4-8 N.M.S.A., 1953.
2. That § 75-4-8 N.M.S.A., 1953, requires that the degree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to

each party, the priority, amount, purpose, period, and place of use . . ."

3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.
4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.
5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.
6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Finding 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.
7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.
8. That in addition to the above-listed present uses adjudicated to the United States, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the



withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

9. That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States.
10. In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511, and 786, and consequently, because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.
11. That among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.
12. That until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.
13. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the

United States shall, within one year after the order is entered on this report, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

IT IS SO ORDERED.

IRWIN S. MOISE  
Special Master

May 2, 1975.

[Filed in State District Court May 15, 1975]

**STATE'S OBJECTIONS TO MASTER'S REPORT**

TO: Donald Redd  
Land & Natural Resources  
Department of Justice  
Washington, D.C. 20530  
James B. Grant  
Assistant U.S. Attorney  
District of New Mexico  
P. O. Box 607  
Albuquerque, New Mexico 87103

Please take notice that the State of New Mexico, ex rel., S. E. Reynolds, State Engineer, objects to the report of Irwin S. Moise, Special Master, filed herein on May 5, 1975, in the following particulars:

1. Finding of Fact No. 2 is incorrect insofar as it recognizes that the United States is entitled to reserved in-stream water rights based upon the purposes for which the Gila National Forest was withdrawn from the public domain.
2. Conclusion of Law No. 10 is legally erroneous.
3. The State of New Mexico further objects to all Findings and Conclusions which recognize that the United States is entitled to reserved water rights for instream uses based upon the purposes for which the Gila National Forest was withdrawn.

The State of New Mexico, ex rel. S. E. Reynolds, State Engineer, therefore moves the court to take such action on these objections and on the report of the master as may be proper.

Respectfully submitted

/s/ Paul L. Bloom  
PAUL L. BLOOM  
RICHARD A. SIMMS  
Special Assistant Attorneys General  
State Engineer Office  
Bataan Memorial Building—  
State Capitol  
Santa Fe, New Mexico 87503

September 2, 1975

Donald Redd, Staff Attorney  
Land & Natural Resources  
Department of Justice  
Washington, D.C. 20530

Re: Mimbres Valley Irrigation Co. v. Salopek, et al.,  
Luna County Court No. 6326.

Dear Mr. Redd:

Please be advised that New Mexico's objections to the master's report have been set for oral arguments before Judge Hodges on Tuesday, February 2, 1976, at 10:10 A.M. at the Luna County Courthouse in Deming, New Mexico.

Sincerely,

/s/ Richard A. Simms  
RICHARD A. SIMMS  
Special Assistant Attorney General



STATE OF NEW MEXICO  
STATE ENGINEER OFFICE  
Santa Fe

February 4, 1976

Hon. Norman Hodges  
District Judge  
P. O. Box 390  
Silver City, New Mexico 88061

Re: Pending Objections to Special Master's Report,  
Mimbres Valley Irrigation Co. v. Tony Salopek,  
et al., Luna County No. 6326.

Dear Judge Hodges:

During argument yesterday on the referenced Objections I asked for leave of the Court to make an untimely objection to conclusion No. 9 of Judge Moise's Findings and Conclusions, believing at the time that No. 9 was recited as a finding instead of a conclusion. However, upon reviewing our files and determining that it is a conclusion and not a finding, I hereby withdraw my motion for the reason that no objection need be made to challenge a master's conclusion of law. [See, Moore's Federal Practice. §§ 53.11 and 53.12(5). New Mexico Rule 53e(2) and the federal rule are identical.]

The same principle would apply to conclusion No. 11, which states that "among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting." Despite the fact that my own view of the matter, as Mr. Redd pointed out, was different in 1972 when I first began the practice of water law, it is clear that recreation was not a purpose for which the Gila National Forest lands could have been withdrawn from the public domain. In this regard I would invite your Honor's attention to the state's Memorandum of Law, especially pp. 24-29.

If any further discussion of this matter would be useful please advise.

Sincerely,

Richard A. Simms  
Special Assistant Attorney General

[Submitted to State Judge Apr. 15, 1976; Filed in  
State District Court June 4, 1976]

OBJECTIONS OF UNITED STATES TO PROPOSED  
ORDER SUBMITTED BY STATE ENGINEER  
SUSTAINING OBJECTIONS AND MODIFYING  
FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

Introduction

This is an action for the adjudication of the rights to the use of the waters of the Mimbres River stream system. This case was referred to a special master for the determination of the individual water rights. With respect to the water rights of the United States in this watershed, hearings were held where live testimony was received, documentary evidence was filed, and oral and written arguments were presented to the Special Master. After careful consideration of the evidence and the oral and written arguments, a report was filed by the Special Master in the form of Findings of Fact and Conclusions of Law.

On May 10, 1975, the State Engineer, through his attorney, filed objections to the Special Master's report. These objections were directed solely to the recognition by the Special Master of water rights reserved by the United States for instream uses based upon the purposes for which the lands within the Gila National Forest were withdrawn from the Public Domain and included within the National Forest.

After the submission of written and oral arguments, the court, in a letter to counsel for the State Engineer and the United States dated March 1, 1976, announced he had "decided to grant or sustain the State Engineer's objections to the Master's Report." Counsel for the State Engineer was directed to "prepare a proper form of Order or Decree" and submit it to counsel for the United States, and then to the court.

On March 5, 1976, counsel for the State Engineer submitted a proposed order designated as "Order Sustaining

Objections and Modifying Findings of Fact and Conclusions of Law." This proposed order not only deleted the findings of fact and conclusions of law from the Master's Report which recognized the rights of the United States to the three instream uses for "fish" purposes but made other changes on items as to which no timely objections had been made and where there was no evidence supporting the changes. These changes will be discussed in more detail in the specific objections raised in this memorandum.

Objections

1. It was Error to Delete the Findings Recognizing the Rights of the United States for the Three Instream Uses.

In the Master's Report, finding of fact no. 2 reads as follows:

As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

Following this there is a tabulation of 37 separate uses. For each use there is shown the location of the use, the government identification number for the use, the quantity of water used in cubic feet per second or acre feet per year, the purpose of the use and the priority date of the right under which the uses are made. Three uses, designated as numbers 024, 511 and 786 were shown as using 2 cubic feet per second each, with no consumptive use and the purpose of each of these was listed as "fish." There was testimony that one of these was for the protection and propagation of a native trout found only in the Gila National Forest which is on the Endangered Special List. The Special Master stated, at the final hearing held by him on the validity of the United States claims for rights to instream uses to maintain minimum flows for valid forest purposes, that he could judicially notice that these live streams not only supported fish life but served other valid forest purposes such as erosion control, fire



protection, watershed protection, maintenance of natural flow downstream from the forest lands, wildlife habitat protection, aesthetics, etc.

In his letter of March 1, 1976, the court raised the following question:

1. Would it be desirable to specify that both the United States of America and the State of New Mexico should be restricted or prohibited from permitting or recognizing:

A. Establishment of a new appropriative water right upstream from the fish areas (Nos. 024, 511 and 786), or

B. Transfer of a senior appropriative water right upstream from the "fish" areas;

if either A or B would interfere with:

A. Improving and protecting the forest within the boundaries; or

B. Securing favorable conditions of water flows (within and below the forest boundaries). (If, incidentally or coincidentally, this helped the streamflow in the "fish" areas—so be it.)

We agree that it is necessary to provide protection to live streamflows within our national forests in order that the forest service officials may effectively perform their duties in the fulfillment of the very basic purposes for which the national forests were established—improving and protecting the forests within the boundaries and securing and protecting favorable conditions of water flows. See Organic Administration Act of 1897, 30 Stat. 34, 16 U.S.C. 475. We doubt that the provision suggested by the court, however, would afford the desired protection. If no right to maintain the live streamflows on the forest lands is recognized it would be extremely difficult for either the forest service officials or the State Engineer to refuse to permit diversions that would dry up these forest streams on the grounds that it would be injurious to the forest and its resources.

We suggest that there is a very simple solution to this problem. Uses 024, 511 and 786 in finding of fact no. 2 should be included as valid uses for forest purposes. As the purposes for these uses, instead of simply listing "fish," there should be added, as purposes, the following: erosion control, fire protection, watershed protection, maintenance of natural flow, wildlife habitat protection, aesthetics, etc. With such a finding and the appropriate corresponding conclusions of law recognizing the right to maintain live streamflows for valid forest purposes, it would not only be made clear that the forest service officials have the clear cut duty to protect these live streamflows but they would have the means to protect them from threatened encroachments and this would not impair any existing water rights or uses.

In his letter of March 5, 1976, counsel for the State Engineer hints that the State Engineer could protect these streamflows from threatened encroachments. We have no assurance, however, that he would make any attempt to protect these streamflows should they be threatened. In view of the vigor with which he has opposed the recognition of the right to maintain these streamflows, it seems rather doubtful that he would make any attempt to protect them. Furthermore, under existing New Mexico Law, it is extremely doubtful that the State Engineer could protect these live streamflows on the forest lands, even if he wanted to, in the absence of a judicially recognized right to maintain them. See "Appropriation by the State of Minimum Flows in New Mexico Streams," *Natural Resources Journal* (University of New Mexico School of Law) Vol. 15, No. 4, October 1975, page 809.

2. It was Error to Delete the Word "Recreational" from Uses No. 226, 229, 230, 231 and 614 and to Change Conclusion of Law No. 11 which Recognized Recreation as a Valid Forest Purpose for which Water Rights were Reserved.

The State Engineer originally agreed that recreation was a valid forest purpose for which water rights were withdrawn by the withdrawal of the lands from the Pub-

lie Domain for forest purposes. No objections were filed by the State Engineer to the findings and conclusions in the Master's Report recognizing reserved water rights for recreation. After it was pointed out, however, that this was inconsistent with the arguments he had made opposing recognition of the United States' rights to the use of waters on national forest lands to maintain live stream-flows, he reversed his position. In the Master's Report, the purposes of uses 226, 229, 230, 231 and 614, in finding of fact no. 1, were shown as both "domestic" and "recreational." Conclusions of law no. 11 read as follows:

That among the uses to which waters of the Mimbres River Stream System reserved for the National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.

In his proposed order modifying the findings of fact and conclusions of law, the State Engineer has deleted "recreational" as one of the purposes for uses 226, 229, 230, 231 and 614 so that the purpose for each of these reads simply "domestic." Conclusion of law no. 11 was deleted. As a substitute, conclusion of law no. 10 in the State Engineer's proposed order reads as follows:

That recreation is not among the purposes for which the above described Gila National Forest lands were or could have been withdrawn from the public domain, and the United States has no reserved water rights in said forest for recreational purposes.

In his letter of March 5, 1976, counsel for the State Engineer states:

The domestic residential uses listed in finding no. 2 are uses made by forest service personnel, and the listed priority dates are appropriate.

We agree that the listed priority dates are appropriate. The statement that the domestic residential uses are uses made by forest service personnel are grossly in error as to uses 226, 229, 230, 231 and 614. Use no. 226 is under a special use permit for a summer home which is not transferable, may be revoked under certain circumstances

and will expire on the death of the permittee. Uses 229, 230 and 231 are public picnic grounds owned, operated and maintained by the Forest Service. There are no forest service officials living at these areas and no facilities provided for them to do so. Use no. 614 is a camp used under permits issued by the Forest Service to groups. It is used approximately once a year for several days by forest service officials for conferences. The buildings and facilities at this camp were built and are owned by the United States.

In his letter to the court, dated March 29, 1976, counsel for the State Engineer objected to the United States presenting new data and information at this late date. We recognize that this is a bit unusual. We submit, however, that this is not only justified but is made necessary by the State Engineer's attempt to delete findings of fact made by the Special Master which were supported by substantial evidence and to substitute findings of fact which are not only supported by no evidence but are in fact erroneous.

In his letter of March 29, 1976, counsel for the State Engineer makes the following statement:

To date there have been no published opinions on the subject, but three district court decisions have rejected the government's claims, namely, the master's decision in federal district court for the district of New Mexico, your decision, and a state district court decision in Idaho. There has been one decision to the contrary, namely, *Soderman v. Kackley*, arising in a different judicial district court in Idaho, and a copy of which was presented to the court during argument in February. *Soderman* is set for argument before the Idaho Supreme Court on April 5, 1976, and for the same reasons that the Attorney General of Idaho would like to have your decision in hand, the Justice Department would prefer he did not.

We assure the court that we had no ulterior motives in asking for extra time within which to submit objections to the State Engineer's proposed order. Our request was motivated solely by a desire to set the record straight on



the various points so that you could have the pertinent facts before you when you made your final decision as to how your order should read with respect to the Master's Report. The fact that counsel is in error as to the count on court rulings for and against the recognition of reserved rights to maintain live streamflows on national forest lands will be discussed in a later section of this memorandum. The point we wish to make here is that the State Engineer and his counsel completely overlook the fact that there have been a number of cases in federal and state courts recognizing reserved rights held by the United States to the use of waters on national forest lands for the purpose of recreation.

We have already invited the court's attention to the fact that the Supreme Court of the United States approved a finding of the Special Master in *Arizona v. California*, that the national forests were established for the following purposes:

1. The protection of watersheds and maintenance of natural flow in streams below the sheds;
2. Production of timber;
3. Production of forage for domestic animals;
4. Protection and propagation of wildlife; and
5. Recreation for the general public.

We also provided the court with a copy of the decree of the Superior Court of the State of Washington In and For Okanogan County in the *Chiliwist Creek* adjudication. This decree recognizes the reserved right of the United States "to make use of the waters of Chiliwist Creek now and in the future in amounts reasonably necessary and sufficient to carry out the limited purposes for which the forest reserve lands were reserved; namely timber management and production and related purposes including fish and wildlife management, livestock grazing and recreational activities."

In the case of *Glenn v. United States*, Civil No. 153-61, in the United States District Court for the District of Utah, the plaintiff challenged the right of the United

States to divert water from a spring on the National Forest and pipe it to a recreation area constructed by the Forest Service on national forest lands. This spring was tributary to a creek from which plaintiff had an appropriate right under a permit issued by the State of Utah to divert and use three acre feet of water per year for irrigation. The court expressly found that "[t]he recreation site and pipeline and diversion facilities constructed by the United States Forest Service were authorized by the Act of June 4, 1897, 30 Stat. 35" and that the United States had a right to make this use of these waters for recreation purposes "by reason of its reservation from entry on February 22, 1897, by the President of the United States." A copy of the findings of fact and conclusions of law in that case is attached.

In the case of *United States v. Alpine Land and Reservoir, et al.*, No. D-183 BRT in the United States District Court for the District of Nevada, the court found inter alia, that:

Toiyabe National Forest was reserved and withdrawn from the public domain and dedicated and set apart as a national forest for the purpose of the protection of watersheds and the maintenance of favorable stream flows in and below the sheds; production of timber; production of forage for domestic animals, protection and propagation of wildlife, including fish; and recreation for the general public.

A copy of the order of the court containing the above finding in the *Alpine* case is attached.

In the case of *United States v. Fallbrook Public Utility District, et al.*, No. 1247 SD-C, in the United States District Court for the Southern District, the court found, inter alia, that:

The waters arising upon or traversing the Cleveland and San Bernardino National Forests are presently used for domestic, recreation, stock watering, fire fighting and wildlife and other beneficial purposes.

The State Engineer has cited the decision of a district court of the State of Idaho in the case entitled *Avondale Irrigation District v. North Idaho Properties*, Case No. 22418 in support of its contention that the reserved water rights for national forests do not include a right to the use of water to maintain live streamflows on national forest lands. He completely overlooks the fact, however, that the *Avondale* case recognizes rights to the use of waters for recreation. Examples are water rights for Makin's Bay Campground and Hells Canyon Campground. That case also recognized a right to the use of water on national forest lands for livestock watering under the reserved water right. These rights were not contested by the State and were not at issue in the appeal to the State Supreme Court or in the district court after remand.

We know of no cases outside the State of New Mexico where a court, State or federal, has held that the reserved water rights for national forests did not include a right to use these waters for purposes of recreation for the general public.

3. It was Error to Change the Priority Dates of the Rights to the Use of Waters for Stockwater in Finding of Fact No. 2.

Finding of fact no. 2 of the Master's Report shows 22 national forest uses of water within the Mimbres River Watershed for Stockwater. For each of these uses the priority date shown was the date of the withdrawal of the lands where the use was made for forest purposes. No objections to these priority dates were filed by the State Engineer. After it was pointed out, however, that this was inconsistent with the arguments he had made opposing recognition of the United States rights to the use of waters on national forest lands to maintain live streamflows, he reversed his position. In his proposed order modifying the Master's findings of fact and conclusion of law, the State Engineer has arbitrarily deleted all of the priority dates for stockwater based on the withdrawal of the lands for forest purposes and substituted the date January 1, 1907, although there is no evidence to support this change.

In his letter of March 1, 1976, the court raised the following question:

2. Priority dates, as of the original forest withdrawal dates (1899, 1905, 1908, 1910) for apparent permittees' uses such as stock water and domestic residential are used in Finding of Fact No. 2.

A. Is this something that may still be litigated at a later date?

B. Would it be more appropriate to show priority dates where a permittee is involved: i.e., United States: withdrawal date; Permittee: actual appropriate date?

The rights to the use of waters on National Forest lands for watering livestock grazing on these lands under permits from the forest service, must necessarily be vested in the United States. If these water rights were vested in the permittees, it would be virtually impossible for the forest service to carry out its duties under the provisions of the Organic Administration Act of 1897, 30 Stat. 34, to protect and improve the forest within the boundaries, to regulate their occupancy and use and to preserve the forests from destruction.

Stockwatering facilities are developed jointly on national forest lands by the forest service and the permittees. Cost of the development is born by the United States and title to the facilities is retained by the United States. These facilities are maintained not only for the permitted livestock but for wildlife.

Stockwatering facilities are located at various points on the grazing allotments so as to control the grazing and prevent overgrazing of areas around watering places. For this purpose, the watering facilities are often fenced. The gates are left open where grazing is permissible. In areas that have been grazed to the extent that further livestock use would be detrimental, the gate is closed. These fenced watering facilities have smooth top and bottom wire on the fences to permit access by wildlife without injury from barbed wire.



Grazing allotments on national forest lands change hands regularly. Of the 19 allotments within the Mimbres River watershed, all but two of them have changed hands at least once within the last 20 years. Two of these allotments have had six different permittees each over the past 20 years. In all there have been 58 changes of grazing permit holders on national forest lands in the Mimbres River watershed within the last twenty years.

Grazing allotments are not unalterable. The number of cattle that may be grazed may be reduced if range conditions indicate the allotment is being overgrazed. By the same token, if range conditions indicate that the allotment could support more animals the permits may be changed by increasing the number of animals that can be grazed on the allotment. Also, the boundaries of an allotment may be changed to increase or decrease the acreage within an allotment.

Grazing permits may be terminated or applications for renewal of a permit may be denied if the permittee does not cooperate with the Forest Service officials in the grazing of his cattle on the allotment in such a way as to avoid overgrazing of certain areas and damage to the forest lands. This power to terminate, or to refuse to renew grazing permits is a powerful and effective tool in effective range management on national forest lands. Its effectiveness would be seriously impaired, however, if the right to the use of waters on the forest grazing allotments for stockwatering were vested in the grazing permittee and had to be transferred by him, with the approval of the State Engineer, to any new permit holder upon the termination or expiration of his grazing permit.

Many watering facilities on forest grazing lands are used by more than one forest grazing permit holder. This is true of several stockwatering facilities on national forest lands within the Mimbres River watershed. Allotments 508 and 270 share the use of Mimbres Lake. (Mimbres Lake is in a small closed basin between the Mimbres and Rio Grande Watersheds. The grazing allotment includes lands in both watersheds.) Uses 500 and 544 share the use of Hay Mesa Tank and Kelly Tank. Uses 500 and 558 (erroneously listed as 588 in the Mas-

ter's Report and State Engineer's proposed order) share the use of Yates Spring. Uses 558 and 587 share the use of Split Water Dam, Lower Well and Upper Well. Use 536 is used by the Forest Service to water its horses and also for stockwatering by a grazing permittee.

Use 804 is the Fort Bayard horse pasture and experimental range. The water is shared by Forest Service horses, wildlife and cattle grazed there as part of a study conducted jointly by the Forest Service and the State of New Mexico. The priority date for this use should be 1869, the reservation date of Fort Bayard. It was also used by the Army for its livestock.

We know of no cases outside the State of New Mexico where a court, state or federal, has refused to recognize stockwatering as a valid use of water for forest purposes under the reserved water right for national forests. It should be noted that the cases cited above as recognizing recreation as a valid forest use also recognize stockwatering as a valid forest use and the fact that the water right for stockwatering on national forest lands is held by the United States.

#### 4. It was Error to Change the Master's Conclusion of Law No. 9.

Conclusion of law no. 9 in the Master's Report reads as follows:

That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest Service *and the permit requires that the use be undertaken in compliance with state law*, the water rights arising therefrom should be adjudicated to the permittee and not to the United States. (Emphasis added.)

No objection was filed to this conclusion. In a memorandum filed approximately eight months after the submission of the Master's Report, however, counsel for the State Engineer argued that in *all* cases where a use of waters found on forest lands was made by forest permittees, the water right should be adjudicated to the per-

mittees under state law. In his proposed order the State Engineer deleted the words "and the permit requires that the use be undertaken in compliance with state law" from conclusion of law no. 9.

16 U.S.C. § 478 was cited by the State Engineer as authority for the proposition that in all cases of use of waters found on forest lands by forest permittees, the rights to such water uses should be adjudicated to the permittee under state law. This statute reads as follows:

Nothing in sections 473 to 478, 479 to 482 and 551 of this title shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads or other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of Agriculture. Nor shall anything herein prohibit any person from entering upon such national forests for all other proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.

This section must be read in conjunction with 16 U.S.C. § 481 which, along with 16 U.S.C. § 478 was originally enacted as part of the Organic Administration Act of June 4, 1897. 16 U.S.C. § 481 reads as follows:

All waters within the boundaries of national forests may be used for *domestic, mining, milling or irrigation purposes* under the laws of the State wherein such national forests are situated, or under the laws of the United States, and the rules and regulations established thereunder. (Emphasis added.)

In expressly spelling out domestic, mining, milling and irrigation purposes Congress made it very clear what uses of waters on forest lands should be under private rights acquired under local law. Clearly this legislation was not

intended to include those water uses closely related to the use and enjoyment of those resources which are necessarily part and parcel of the forest.

In section 3 of this memorandum we have pointed out some of the serious problems the Forest Service would have in effectively managing and protecting national forest lands if the rights to the use of waters found thereon for stockwatering were vested in the grazing permit holders.

If the State Engineer's Proposed Conclusions of Law should be adopted and construed literally, it would mean that every individual with a permit to cut timber on forest lands would need to obtain a permit from the State Engineer to appropriate water if his logging operation involves the use of waters on forest lands. It would mean that individuals obtaining a permit from the forest to camp on the national forest would need to acquire a water right under state law for the water used while camping.

5. It was Error to Delete the Master's Conclusion of Law No. 10 and to Insert the State Engineer's Proposed Conclusion of Law No. 11.

Conclusion of law no. 10 in the Master's Report reads as follows:

In view of the fact that there are no appropriators upstream of the instream uses numbered 024, 511 and 786, and because said federal uses can be made without interfering with upstream appropriators or with one of the express purposes of the Gila National Forest of managing the watershed for the protection of watersheds and the maintenance of natural flow in streams below these sheds, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.

This conclusion of law was deleted by the State Engineer in his proposed order and his proposed conclusion of law no. 11 was inserted. It reads as follows:



That the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain.

This conclusion of law again points up the inconsistency of the position of the State Engineer and his counsel with respect to the reserved right of the United States to use waters on national forest lands to maintain live streamflows for valid forest purposes. They have argued that there is no reserved water right to maintain live streamflows because the only purposes for which the national forests were established were for production of timber and for securing favorable conditions of water flows. Even if we were to adopt their argument that these are the only valid forest purposes, it is still apparent that the maintenance of the live streams promotes those particular purposes by providing fire protection, erosion control, protecting the base flow of the streams, etc. The State Engineer's proposed conclusion of law is unequivocal, however, that the United States has no reserved rights to minimum streamflows regardless of what benefits may be derived from them or what purpose they serve.

As noted above, counsel for the State Engineer in his letter of March 29, 1976, argues that the decisions with respect to recognition of a reserved right to maintain live streamflows on national forest lands are three to one against such recognition. We suggest that such a count should bear little weight, even if accurate. We submit that the language of the court in the *Chiliwist Creek* case, *supra*, is broad enough to include the maintenance of live streamflows for the specified forest purposes. It should also be noted that the order in the *Alpine* case, *supra*, expressly recognizes the right to maintain minimum streamflows.

The court has raised the question of whether one year from entry of the order on this report will be sufficient time for the United States to quantify and specify its future water needs for forest purposes within the Mimbres watershed. The forest service officials have been working on this problem for some time and, in view of

the delays in this case, it is anticipated that one year from entry of a final order on the Master's Report should be sufficient time for the United States to perform this task.

#### Conclusion

Because the Master's Report is supported by substantial evidence and is correct in law, while the State Engineer's proposed changes to the Master's Report are not supported by any evidence and contain erroneous legal conclusions, the court should adopt the Master's Report as submitted by him. In the alternative, the case should be reopened for the admission of additional evidence.

Respectfully submitted,

VICTOR R. ORTEGA  
United States Attorney

By /s/ James B. Grant, DWR  
JAMES B. GRANT  
Assistant United States Attorney

/s/ Donald W. Redd  
DONALD W. REDD  
Attorney, Department of Justice  
Washington, D.C. 20530

April 27, 1976

Honorable Norman Hodges  
District Judge  
P. O. Box 390  
Silver City, New Mexico 88061

Re: Mimbres Valley Irrigation Co. v. Salopek, et al.,  
Luna County No. 6326.

Dear Judge Hodges:

In its recently filed instrument called Objections to Proposed Order Submitted by State Engineer Sustaining Objections and Modifying Findings of Fact and Conclusions of Law, which ostensibly responds to the court's decision and letter of March 1, 1976, the United States asserts that in drafting the proposed order sustaining the state's objections I "not only deleted the findings of fact and conclusions of law . . . which recognized the rights of the United States to the . . . instream uses for 'fish' purposes but made other changes on items as to which no timely objections had been made and where there was no evidence supporting the changes." The record, however, does not support the assertion.

There were three general areas of disagreement, the first of which was embodied in the state's Objections of May 10, 1975, relating to the master's recommendation that the court recognize reserved rights for claimed instream uses based upon the purposes for which the Gila National Forest lands were withdrawn from the public domain. As announced in the court's letter of March 1, 1976, these objections were sustained, and the report of the master was modified accordingly. Now, however, instead of responding to the questions posed by the court, the United States, is asking the court to ignore the record and the evidence at trial, to substitute new "purposes" for the claimed instream uses, and to change its decision sustaining New Mexico's objections. I would suggest, however, that the proper forum in which to argue the merits of your honor's decision is the New Mexico Supreme Court on appeal.

The second area of disagreement had to do with claimed recreational uses, to which the United States asserts New Mexico made no timely objection. The matter was argued at the February 3rd hearing as an objection, and it was pointed out in my letter to the court of February 4, 1976, that no formal objection need have been made to challenge a master's conclusion of law. The basis of our objection to the recreational uses, as was argued on February 3rd, was precisely the same as the basis of our objections to instream uses, and in this regard I invited the court's attention to the state's Memorandum of Law, especially pp. 24-29. There was no retreat from our objection, it was timely, and it was predicated upon the identical line of reasoning behind our objections of May 10, 1976, to certain of the master's recommended findings. For these reasons the word "recreational" was deleted from certain of the listed forest uses and the conclusion of law relating to the recreational claims was eliminated.

The United States is disturbed because New Mexico's position is allegedly inconsistent with our position as stated in a brief I wrote in 1972. The only inconsistency that could arise in this context would be the result of adhering to the statement in the 1972 brief. It is undisputably clear from the legislative history that the Gila National Forest could not have been withdrawn from the public domain for recreational purposes, and it is clear that reserved water rights, which have their genesis in the act of withdrawing lands from the public domain for particular purposes, cannot arise by virtue of the government's authority under § 478 of the Organic Administration Act to regulate such "proper and lawful" private uses of forest lands as recreational uses. In any event, it is totally academic that a different position was taken in 1972. New Mexico was not barred from making new or alternative arguments.

The third area of disagreement had to do with the recommended legal conclusion No. 9 respecting the point of law requiring that rights arising out of water uses made by forest permittees be adjudicated to them instead of the United States. In the proposed order modifying the mas-



ter's findings and conclusions, the phrase "and the permit requires that the use be undertaken in compliance with state law" was deleted. Again, timely objection to the legal conclusion was made, the matter was argued on February 3rd, and it was discussed in my letter of February 4, 1976. The United States' statement that "serious problems (would arise) in effectively managing and protecting national forest lands if the rights to the use of waters found thereon for stockwatering were vested in the grazing permit holders" is misleading. We have offered to recognize the rights as pre-1907, vested rights, and accordingly no state permits would be required, no change of ownership documents would be required with regard to successive permittees making the same stockwatering use, and there would be no interference with the processes of the national government in regulating private uses made on forest lands.

It appears that the United States is simply quarreling with the court's decision. The United States is also suggesting that the court disregard certain uncontested evidenciary findings and replace them with "judicial notice" of other alleged facts which would operate to change the result of the trial. As to the former approach the proper forum is the New Mexico Supreme Court, and as to the latter it is not only "a bit unusual," as the United State suggests, but a bit irregular. It should also be noted that such statements as 'every individual wanting to camp on forest lands would need to acquire a water right under state law' amount to nothing more than unfounded sensationalism. New Mexico law would require no such thing, and if need be we would be happy to stipulate that the rights of hunters, fishermen, hikers, and campers to the free use of the water of the public watercourses of the State of New Mexico on forest lands would in no way be qualified or interfered with by virtue of the proposed order.

In conclusion we would urge the adoption of New Mexico's proposed order modifying the master's findings and conclusions in accordance with the court's decision. The order comports with that decision, and it is clear that the United

States is not really quarreling with the form of the order, but rather with the merits of the decision.

Sincerely,

RICHARD A. SIMMS  
Special Assistant Attorney General

[Filed in State District Court June 4, 1976]

**ORDER SUSTAINING OBJECTIONS AND  
MODIFYING FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

This matter coming on to be heard upon the Findings of Fact and Conclusions of Law of the Special Master, filed herein on May 2, 1975, and the State of New Mexico, plaintiff-in-intervention, having filed its Objections thereto on May 15, 1975, the parties having been heard on said Objections, and upon due deliberation and being fully advised,

IT IS ORDERED that the Objections are hereby sustained and that the Special Master's Findings of Fact and Conclusions are modified in accordance herewith, as follows:

**FINDINGS OF FACT**

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:

- a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.

- b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres Watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.
- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.
- d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13, and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T.



17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.

- e. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W.; Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.

2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

Location Sec., T., R.	U.S. Government Identification Number	Acre Feet Per Annum	Purpose	Priority
— 16S 10W	200	2.21	Stockwater	1-1-1907
— 16S 9W	206	.51	Stockwater	1-1-1907
4 16S 9W	207	.01	Domestic Residential	7-21-1905
— 16S 9W	225	3.09	Stockwater	1-1-1907
16 19S 9W	226	.03	Domestic	7-21-1905
18 16S 9W	229	.03	Domestic	7-21-1905
18 16S 9W	230	.03	Domestic	7-21-1905
19 16S 9W	231	.01	Domestic	7-21-1905
— 16S 10W	249	1.00	Stockwater	1-1-1907
— 17S 9W	264	3.52	Stockwater	1-1-1907
— 17S 9W	281	3.21	Stockwater	1-1-1907
— 18S 9W	283	0.98	Stockwater	1-1-1907
— 18S 9W	307	3.57	Stockwater	1-1-1907
— 14S 10W	500	9.11	Stockwater	1-1-1907
28 14S 11W	523	2.50	Stockwater	1-1-1907
35 14S 10W	535	.02	Domestic Residential	3-2-1899
35 14S 10W	536	.02	Stockwater	1-1-1907
— 15S 11W	544	6.97	Stockwater	1-1-1907
— — —	588	8.82	Stockwater	1-1-1907

Location Sec., T., R.	U.S. Government Identification Number	Acre Feet Per Annum	Purpose	Priority
— 16S 10W	587	12.65	Stockwater	1-1-1907
31 15S 11W	614	3.00	Domestic	3-2-1899
7 16S 11W	639	6.87	Domestic Residential	5-9-1910
— 16S 12W	668	1.89	Stockwater	1-1-1907
— 16S 11W	674	2.94	Stockwater	1-1-1907
— 17S 12W	689	1.09	Stockwater	1-1-1907
— 17S 12W	698	4.94	Stockwater	1-1-1907
— 16S 12W	726	.63	Stockwater	1-1-1907
7 16S 13W	800	.51	Stockwater	1-1-1907
— 17S 13W	804	2.64	Stockwater	1-1-1907
— — —	881	6.50	Roadwater	1905
10 17S 16W	901	0.12	Domestic	1908
— 12S 15W	907	1.65	Stockwater	1-1-1907
17 17S 14W	946	.01	Domestic	1908
		Total	91.08	

3. That the United States owns lands as follows which were reserved for military use as the Ft. Bayard Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to a point thirteen chains south of the north line of the southwest  $\frac{1}{4}$  of Section 10; thence east to the west line of northeast  $\frac{1}{4}$  of southwest corner of same; thence east along the south line of same and along south line of northwest  $\frac{1}{4}$  of southeast  $\frac{1}{4}$  of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast  $\frac{1}{4}$  of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom,

four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.

4. That on January 2, 1941, all of the lands of the Ft. Bayard Military Reservation except the SE  $\frac{1}{4}$  of Section 25, the SE  $\frac{1}{4}$  of Section 26, the NE  $\frac{1}{4}$  of Section 35, and the NW  $\frac{1}{4}$  of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U.S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.

5. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW  $\frac{1}{4}$  of Section 25, the SE  $\frac{1}{4}$  of Section 26, the NE  $\frac{1}{4}$  of Section 35, and the NW  $\frac{1}{4}$  of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.

6. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of Agriculture:

All that part of the SW  $\frac{1}{4}$ , Section 25; SE  $\frac{1}{4}$ , Section 26; NE  $\frac{1}{4}$ , Section 35; and NW  $\frac{1}{4}$ , Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE  $\frac{1}{4}$ , said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.  $29^{\circ}43'E.$ , 37.30 ft. to Cor. No. 1-B; thence N.  $60^{\circ}17'E.$ , 21.25 ft. to Cor. No. 1-C; thence N.  $29^{\circ}43'W.$ , 24.65 ft. to Cor. No. 1-B; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW  $\frac{1}{4}$ , said Section 25; thence S.  $18^{\circ}30'E.$ , 2380.00 ft. to Cor. No. 3; thence S.  $47^{\circ}59'W.$ , 1573.40 ft. to Cor. No. 4; thence S.  $23^{\circ}00'W.$ , 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 6.15.00 ft. to Cor. No. 7 on the South line of the NW  $\frac{1}{4}$ , said Section 36; thence S.  $89^{\circ}03'W.$ , 2504.57 ft. to Cor. No. 8 on the South line of the NE  $\frac{1}{4}$ , said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and

distances; N.  $28^{\circ}13'W.$ , 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a  $7^{\circ}50'$  curve to the left (chord bearing and distance N.  $45^{\circ}54'W.$ , 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE  $\frac{1}{4}$ , said Section 35; thence N.  $1^{\circ}43'W.$ , 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

7. That of that portion of the SW  $\frac{1}{4}$  of Section 25, the SE  $\frac{1}{4}$  of Section 26, the NE  $\frac{1}{4}$  of Section 35, and the NW  $\frac{1}{4}$  of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE  $\frac{1}{4}$ , said Section 26, bears N.  $75^{\circ}30'W.$ , 949.62 ft. dist.; thence S.  $80^{\circ}00'E.$ , 669.00 ft. to the Northeast Cor., thence S.  $9^{\circ}55'W.$ , 960 ft. to the Southeast Cor.; thence N.  $81^{\circ}00'W.$ , 669.00 ft. to the Southwest Cor.; thence N.  $9^{\circ}57'E.$ , 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

8. In addition to the reserved rights described herein the United States has an appropriate right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

### CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of § 75-4-2 to 75-4-8 N.M.S.A., 1953.

2. That § 75-4-8 N.M.S.A., 1953, requires that the decree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."

3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.



4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.

5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding No. 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.

6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Finding 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.

7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.

8. That in addition to the above-listed present uses made by the United States, or its permittees, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

9. That with respect to the above-listed uses in the Gila National Forest where the facts will show that the uses have been made by permittees of the United States Forest Service, the water rights arising therefrom should be adjudicated to the permittee under the law of prior appropriation and not to the United States.

10. That recreation is not among the purposes for which the above-described Gila National Forest lands were

or could have been withdrawn from the public domain, and the United States has no reserved water rights in said forest for recreational purposes.

11. That the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain.

12. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year from the date of this order, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

DONE this 26th day of March, 1976.

/s/ Hon. Norman Hodges  
HON. NORMAN HODGES  
District Judge

[Filed in State District Court July 2, 1976]

### NOTICE OF APPEAL

Notice is hereby given that the DEPARTMENT OF AGRICULTURE FOREST SERVICE, one of the defendants herein, hereby appeals to the Supreme Court of New Mexico from the Order Sustaining Objections And Modifying Findings of Fact And Conclusions of Law entered in cause No. 6326 on June 3, 1976.

VICTOR R. ORTEGA  
United States Attorney

/s/ James B. Grant  
JAMES B. GRANT  
Assistant U.S. Attorney

[Filed in State District Court July 2, 1976]

TO: J. WAYNE WOODBURY  
Attorney at Law  
P.O. Box 857  
Silver City, New Mexico 88061

BEN SHANTZ  
Shantz, Dickson & Young  
P.O. Box 1219  
Silver City, New Mexico 88061

RICHARD A. SIMMS  
Special Assistant Attorney General  
State Engineer Office  
Bataan Memorial Building  
Santa Fe, New Mexico 87503

YOU AND EACH OF YOU will please take notice that on the 30th day of June, 1976, the defendant DEPARTMENT OF AGRICULTURE FOREST SERVICE, by filing a Notice of Appeal, a copy of which is attached hereto, took an appeal from the Order Sustaining Objections And Modifying Findings of Fact And Conclusions Of Law entered in cause No. 6326 on June 3, 1976.

VICTOR R. ORTEGA  
United States Attorney

/s/ James B. Grant  
JAMES B. GRANT  
Assistant U.S. Attorney

### PROOF OF SERVICE

I, the undersigned, do hereby certify that on the 30th day of June, 1976 I mailed a copy of the foregoing pleading to the above-named attorneys at the address indicated herein.

/s/ James B. Grant  
JAMES B. GRANT  
Assistant U.S. Attorney



IN THE SUPREME COURT  
OF THE STATE OF NEW MEXICO

---

No. 11,094

---

MIMBRES VALLEY IRRIGATION CO.,  
PLAINTIFF-APPELLEE,

*vs.*

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES

*vs.*

DEPARTMENT OF AGRICULTURE FOREST SERVICE,  
DEFENDANT-APPELLANT,  
STATE OF NEW MEXICO,  
PLAINTIFF-IN-INTERVENTION-APPELLEE

---

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY  
Norman Hodges, District Judge

---

OPINION

PAYNE, Justice

This suit was filed in 1966 as a private action to enjoin alleged illegal diversions of the Rio Mimbres which flows through the Gila National Forest in southwest New Mexico. In 1970 the State of New Mexico, on the relation of the State Engineer and pursuant to § 75-4-4, N.M.S.A. 1953, Repl. Vol. 11, Pt. 2, 1968), filed a complaint-in-intervention seeking a general adjudication of water

rights in the Rio Mimbres and its tributaries. The complaint-in-intervention named as defendants all parties claiming any interest in and use of the waters of the Rio Mimbres. The State's motion to intervene was granted and the suit proceeded as a general statutory adjudication of all the water rights on the stream system.

Among the named defendants in the complaint-in-intervention was the United States of America, joined pursuant to 43 U.S.C. § 66 (1970). The United States claimed reserved water rights for minimum instream flows and for recreational purposes within the Gila National Forest. The matter was referred by the trial court to a special master to determine the rights of the parties. The master entered findings of fact and conclusions of law which supported the United States' claim to 6.0 cubic feet per second of water in the Gila National Forest for minimum instream flows and recreational purposes. The State of New Mexico, pursuant to N.M.R. Civ. P. 53(e) (2) <sup>1</sup>, objected to the master's report. The district court reversed, holding that the United States had not reserved water rights in the Gila National Forest for its claimed purposes. We affirm the decision of the district court.

The "reservation" doctrine, as it applies to federal enclaves, was initially recognized in *United States v. Winters*, 207 U.S. 564 (1908). The issue decided therein was whether the United States, at the time of the creation of the Fort Belknap Indian Reservation in Montana, had impliedly reserved a water right for future use of the Indians upon those lands. The United States Supreme Court upheld the power of the federal government to reserve the waters and exempt them from appropriation under state laws.

The exact meaning of the principle articulated in the *Winters* case has been subject to inconclusive debate through the years. It was further clarified, however, in *Arizona v. California*, 373 U.S. 546 (1963), a case that also involved waters flowing through the Gila National Forest. The United States Supreme Court reaffirmed the viability of the *Winters* doctrine, and for the first time

<sup>1</sup> Section 21-1-1(53)(e)(2), N.M.S.A. 1953 (Repl. Vol. 4, 1970).

extended the reservation doctrine to other non-Indian federal enclaves. Although it refused to discuss the non-Indian related claims, the Court said:

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

373 U.S. at 601:

More recently the Supreme Court has given additional guidance on the application of the principle of reserved water rights. In *Cappeart v. United States*, 426 U.S. 128 (1976), the Court stated:

[W]hen the Federal Government reserves land, by implication it reserves the water rights sufficient to accomplish the purposes of the reservation.

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created . . . . (Citations omitted.)

426 U.S. at 139.

The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more . . . . (Citation omitted.)

*Id.* at 141.

The *Cappeart* decision restricts the application of the reservation doctrine to the limited purposes for which the reservation was created.

The final decree entered in *Arizona v. California*<sup>2</sup> concludes that the United States has reserved water rights in "quantities reasonably necessary to fulfill the purposes of the Gila National Forest." Applying the *Cappeart* Rule, we must now determine for what purpose the Gila National Forest was originally established and whether those purposes necessarily require an implied reservation of water.

The Gila National Forest was established by separate presidential proclamation dated March 2, 1899, July 2, 1905, February 6, 1907, June 18, 1908 and May 9, 1910. In subsequent years portions of other national forests were transferred to the Gila National Forest so that it now comprises about 2,787,093 acres of land in southwestern New Mexico. Approximately 92,622 acres of privately owned land is encompassed by the forest. The legislative act under which the establishment of national forests was authorized is the Creative Act of March 3, 1891. 16 U.S.C. § 471 (1970). It reads as follows:

The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

The statute did not set forth the purposes for which the forests were withdrawn nor did it set up the means of administration of the forests. Further congressional action to remedy this situation resulted in the passage of the Organic Act of 1897. 16 U.S.C. § 475 (1970); see Bassman, "The 1897 Organic Act: A Historical Perspective," 7 *Nat.Res.Law.* 503 (1974). The pertinent provision of that Act reads as follows:

<sup>2</sup> 376 U.S. 340, 350 (1964). Decree carrying into effect the United States Supreme Court's prior opinion of June 3, 1963, 373 U.S. 546.



§ 475. Purposes For Which National Forests May Be Established And Administered.

... No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.

The United States asserts that additional recreational purposes were envisioned when the act was passed. It likewise argues that minimum instream flows are necessary for aesthetic, environmental, recreational and "fish" purposes. We do not disagree with the objective of preserving the aesthetic and environmentally pleasing qualities of the forests and we appreciate the availability of the forests for recreational purposes. We cannot agree, however, that these objectives come within the original intent of Congress when creating national forests. The United States would equate these other "uses" of the forest as part of the original "purposes" for which it was established, and argues that the "uses" and "purposes" of the forest are one and the same. Congress has provided that the Secretary of Agriculture is authorized "to regulate . . . occupancy and use and to preserve the forests thereon from destruction . . ." 16 U.S.C. § 551 (1970). We are urged to recognize this section of the Code as support for the proposition that the words "occupancy and use" contemplate more than the limited purposes set out in the Organic Act. We cannot take such liberty with the expressions of Congress. There is little doubt that if secondary uses such as grazing, mining or recreation conflict with the primary purposes of assuring watershed

protection or timber preservation, those secondary uses would not be permitted to continue. *United States v. Grimaud*, 220 U.S. 506 (1911); *Light v. United States*, 220 U.S. 523 (1911); *United States v. Hunt*, 19 F.2d 634 (N.D. Ariz. 1927); *Honchok v. Hardin*, 326 Fed. Supp. 988 (D. Md. 1971). The fact that Congress has opened the national forests for the many diversified uses which are now allowed does not expand the purposes for which they were originally created.

If there remains any question concerning the applicability of the "reservation" doctrine for the uses now claimed by the United States, it is dispelled by the Multiple-Use Sustained-Yield Act of 1960. 16 U.S.C. § 528 (1970). This act includes the following proviso:

It is the policy of the Congress that national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title.

The United States argues that this enactment by Congress clarifies and is further support for its position that these additional purposes have always been considered as integral parts of the whole purpose of the Creative and Organic Acts. A similar argument was made in *West Virginia Div. of Izaak Walton L. of Am., Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975), wherein the Court stated:

In effect, appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds. First of all, it is at odds with the well established rule that repeal of a statute by implication is not favored and, as recently stated by the Court in *Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974):

"In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."

In addition to the foregoing principle, Section 1 of the Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language:

"The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. § 475)."

Appellants' argument in this respect also elides the fact that in and out of Congress there has not been unanimous agreement with respect to the interpretation and application of the Multiple-Use Act. Over a decade after its passage controversy over its meaning and intent, as well as the management practices of the Forest Service, . . . has continued unabated.

....

[F]rom our review of the material at hand we are satisfied that in enacting this legislation Congress did not intent [sic] to jettison or repeal the Organic Act of 1897. We are equally satisfied that this act did not constitute a ratification of the relatively new policy of the Forest Service . . .

522 F.2d at 953-54.

The Multiple-Use Sustained-Yield Act can just as easily be interpreted to exclude the additional purposes as part of the original intent of the Organic Act. The fact that Congress declared them to be "supplemental to" the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act. The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the

Gila National Forest was established under the Organic Act of 1897.

We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated.

We are aware of the advancing environmental and aesthetic concerns related to the use of our natural resources. Had the congressional enactments and their interpretations by the Supreme Court given us leeway so as to interpret more broadly the intent of the Creative and Organic Acts we may have been persuaded to decide differently. However, the intent of Congress is clear and we must follow it.

An additional matter raised in this appeal is whether the water rights used by permittees of the United States Forest Service should be adjudicated to the permittee under the state law of prior appropriation or outright to the United States. The prior discussion in this opinion reveals that the United States does not have reserved water rights in the forests for these permitted uses. It necessarily follows that water rights must be perfected and held by the permittee in accordance with state law.

We affirm the trial court.

IT IS SO ORDERED.

/s/ H. Vern Payne  
H. VERN PAYNE  
Justice

/s/ Dan Sosa, Jr.  
DAN SOSA, JR.  
Justice

/s/ Mack Easley  
MACK EASLEY  
Justice



IN THE SUPREME COURT  
OF THE STATE OF NEW MEXICO  
LUNA COUNTY

Monday, May 23, 1977

---

No. 11,094

---

MIMBRES VALLEY IRRIGATION Co.,  
PLAINTIFF-APPELLEE,

vs.

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES,

vs.

DEPARTMENT OF AGRICULTURE FOREST SERVICE,  
DEFENDANT-APPELLANT,

STATE OF NEW MEXICO,  
PLAINTIFF-IN-INTERVENTION-APPELLEE.

---

This cause having heretofore been argued, submitted and taken under advisement, and the Court now being sufficiently advised in the premises announces its decision by Mr. Justice Payne, Mr. Justice Sosa and Mr. Justice Easley concurring, affirming the judgment of the trial court for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS ORDERED that the judgment of the District Court in and for the County of Luna, whence this cause came into this Court, be and the same is hereby affirmed, and the cause be and the same is here-

by remanded to the said District Court of Luna County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

244

SUPREME COURT OF THE UNITED STATES

No. A-139

UNITED STATES, PETITIONER,

*v.*

NEW MEXICO

---

ORDER EXTENDING TIME TO FILE PETITION  
FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel  
for petitioner,

IT IS ORDERED that the time for filing a petition  
for writ of certiorari in the above-entitled cause be, and  
the same is hereby, extended to and including October 3,  
1977.

/s/ William H. Rehnquist  
Associate Justice of the Supreme  
Court of the United States

Dated this 11th day of August, 1977.

245

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-510

UNITED STATES, PETITIONER,

*v.*

NEW MEXICO

ORDER ALLOWING CERTIORARI

Filed January 9, 1978

The petition herein for a writ of certiorari to the  
Supreme Court of the State of New Mexico is granted.